92-477

No. 92-

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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COLORADO INTERSTATE GAS COMPANY,
*Petitioner*,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
NGPL-TRAILBLAZER, INC.,
*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a jury verdict that defendant attempted to monopolize, based on proof that defendant through predatory conduct excluded its lower-priced competitor and then charged supra-competitive prices, can properly be overturned on appeal solely because:

   a. A 54% market share, though achieved through predation and resulting in supra-competitive prices, is not in the court's estimation close enough to monopoly to support a verdict of attempted monopolization; and

   b. The monopoly power and supra-competitive profits achieved by predation would not last for more than six years.

2. Whether recovery of damages awarded by special verdict on a claim affirmed on appeal must be barred if:

   a. The district court initially eliminated the common damages on that claim to avoid double recovery based on a second claim; and

   b. The other claim is reversed on appeal.

## PARTIES

The parties to the proceeding below were: Colorado Interstate Gas Company, Natural Gas Pipe Line Company of America, and NGPL-Trailblazer, Inc. The parent companies and subsidiaries (except wholly owned subsidiaries) of petitioner include: The Coastal Corporation, Coastal Natural Gas Company, and Natural Fuels Corporation.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner respectfully requests that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Tenth Circuit in this case or, at a minimum, that this petition be held in abeyance pending this Court's resolution of No. 91-10, *Spectrum Sports, Inc.* v. *McQuillan.*

## OPINIONS BELOW

The opinion of the court of appeals is reported at 962 F.2d 1528, and is included in the Appendix at pp. 1a-14a. The order of the court of appeals denying rehearing is included in the Appendix at pp. 110a-111a. The order of the district court appealed from is included in the Appendix at pp. 42a-53a. The earlier opinion of the court of appeals in this case is reported at 885 F.2d 683, and is

included in the Appendix at pp. 15a-41a. The opinion of the district court denying respondents' motion for judgment notwithstanding the verdict and for a new trial is reported at 661 F. Supp. 1448, and is included in the Appendix at pp. 51a-109a. For the assistance of the Court, the special verdict forms employed by the jury are included in the Appendix at 112a-119a.

## JURISDICTION

The opinion and judgment of the court of appeals was entered on May 6, 1992. A timely petition for rehearing was denied on June 16, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 2 of the Sherman Act provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2.

Section 4 of the Clayton Act provides in pertinent part: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a).

Federal Rule of Civil Procedure 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated . . .; or (6) any other reason justifying relief from the operation of the judgment.

Federal Rule of Civil Procedure 49(a) provides in relevant part:

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue.

## STATEMENT OF THE CASE

Petitioner, Colorado Interstate Gas Company ("CIG"), brought this case against respondents, Natural Gas Pipeline Company of America ("NGPL") and NGPL-Trailblazer, Inc., alleging that NGPL had attempted to monopolize the market for long-distance transportation of Wyoming gas in violation of Section 2 of the Sherman Act. CIG also claimed that NGPL tortiously interfered with a CIG gas purchase contract and breached other duties. A jury found in favor of CIG on all counts.

This case, which encompasses two appeals, presents two separate issues. The Tenth Circuit on the first appeal affirmed CIG's recovery on the tort claim and reversed the jury's antitrust verdict by relying upon an extreme standard for proving attempted monopolization claims under Section 2 of the Sherman Act. On the second appeal, the Tenth Circuit limited CIG's full recovery of damages on the previously affirmed tort claim, solely because damages common to the tort and antitrust awards had been allocated to the antitrust award, which had been reversed on the first appeal. The panel's rule limiting recovery merits this Court's review, and, at a minimum, this Court should hold the petition pending resolution of a case currently before this Court, *Spectrum Sports, Inc.* v. *McQuillan*, No. 91-10.

**A. NGPL's Anticompetitive and Tortious Conduct.**

CIG is a pipeline company that buys, transports, and sells natural gas. CIG's pipeline begins in southwest Wyoming and runs east across Wyoming and then south into the Oklahoma and Texas panhandles. There, CIG's pipeline connects with other major "trunk" lines that can carry the gas to the Midwest.

NGPL is also a pipeline company. It owns one of the trunklines that intersects with CIG's in Oklahoma. That pipeline runs northeast from Oklahoma to Chicago, Illinois, where NGPL sells natural gas to consumers.

For many years, NGPL has purchased gas from CIG that CIG bought in Wyoming and transported to Oklahoma, where it delivered the gas to NGPL's trunkline. In 1982, CIG and NGPL entered into a seven-year contract that required CIG to deliver and NGPL to purchase substantial volumes of natural gas.

NGPL also has the largest economic interest in the relatively new Trailblazer Pipeline System, which transports gas from southwest Wyoming to the midwest. NGPL-Trailblazer, Inc., a wholly owned subsidiary of NGPL, together with two partners, owns one of three segments of the Trailblazer System. This pipeline runs from southwest Wyoming, parallel to CIG's pipeline as far as Cheyenne, and then continues east, where it intersects the NGPL pipeline. The System thus provides an alternative to CIG's pipeline for moving Wyoming gas to the midwest.

FERC imposed an unusual rate structure upon the Trailblazer System in which revenues would increase sharply, but only as the amount of gas flowing through the system ("throughput") increased, thereby placing on the pipeline owners the risk that either the supply or the demand projections would not materialize. The Trailblazer System cost $500 million to build, 70 percent of which was financed through debt. NGPL assumed roughly

50 percent of this debt and received control over roughly 50 percent of the System's capacity. App. 75a.[1]

Soon after the Trailblazer System began transporting gas in late 1982, NGPL found that throughput and consequently revenues were far less than had been projected. Consumption patterns ensured that there was little prospect for increasing the flow of gas in the system. Indeed, NGPL saw that under ordinary competitive conditions the Trailblazer System could not draw business away from other pipelines because the System, a new pipeline built at higher cost, had to charge significantly higher transportation rates than those of older, fully amortized pipelines, such as CIG's.

NGPL responded to this economic predicament with "reprehensible conduct" (App. 32a) that lacked in legitimate business justification: It manipulated its gas purchases to exclude CIG from the market for transporting natural gas, leaving Wyoming producers no choice but to use the higher-priced Trailblazer System. *Id.* 63a-64a, 81a-82a. Beginning in July 1983, NGPL refused to purchase and accept delivery of gas from CIG. This refusal effectively tied up roughly half of CIG's long-distance transportation capacity because both the Service Agreement and the Natural Gas Act ("NGA") required CIG to reserve this capacity for NGPL in the event NGPL resumed purchases.[2] *Id.* at 36a.

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[1] NGPL's substantial capacity control gave it the chief interest in the Trailblazer System. Although CIG owned one of the three segments of the System, App. 30a n.14, it assumed a much smaller percentage of the debt and therefore controlled far less of the System's capacity than did NGPL. CIG had no control over any pipeline capacity east of Cheyenne, and no control whatsoever over NGPL's use of its capacity, even on the segment owned by CIG.

[2] NGPL then took additional steps to further its scheme to exclude CIG from the market. NGPL deliberately interrupted CIG's attempts to provide transportation for new customers by making strategically timed demands for gas from CIG. App. at 32a, 63a. NGPL also perpetuated the tie-up by refusing to take ad-

NGPL's refusal to accept gas from CIG forced CIG to stop purchasing and ultimately to relinquish its rights to purchase gas from several suppliers, including its largest, Champlin Petroleum, which then had to use the higher-priced Trailblazer System. *Id.* at 82a. CIG had arranged facilities for transportation of the Champlin gas from the fields to CIG's system in Colorado. When NGPL's actions forced CIG to relinquish its gas purchase rights, CIG remained obligated to pay "demand charges" for these gas transport facilities. These obligations formed the basis for the jury's subsequent finding of more than $15 million in demand charge damages stemming from both NGPL's antitrust violation *and* NGPL's tortious interference with the Champlin contract.

Other suppliers that attempted to use CIG's pipeline had their service interrupted by NGPL's strategically timed purchase demands, which forced them to use the Trailblazer System. *Id.* at 63a. By the time the filing of CIG's lawsuit halted NGPL's anticompetitive tactics, NGPL had managed to increase Trailblazer's share of the market for long-distance transportation of Wyoming gas from 41% to 54%, while CIG's fell from 23% to 13%. *Id.* at 76a. More importantly, NGPL's predatory tactics left Trailblazer as the "one transportation alternative for Wyoming natural gas" (*id.* at 63a), because the other Wyoming pipelines were tied-up, or full-to-capacity as a result of CIG's tie-up, or otherwise unavailable. *Id.* Consequently, NGPL's actions harmed the market as well as CIG: suppliers and shippers that needed long-distance transportation were forced to pay "supracompetitive

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vantage of CIG's offer to "renominate" a lower minimum purchase level, which would allow a buyer in NGPL's position to decrease or eliminate fixed costs. *Id.* at 81a, 31a-32a. And, by immediately and permanently replacing CIG's gas with *more expensive* gas, NGPL demonstrated that its purposes in refusing to purchase CIG's gas were not to decrease costs, but to eliminate a lower-cost competitor and force suppliers to pay the Trailblazer System's supracompetitive prices. *Id.* at 78a-82a.

prices" (*id.* at 39a), which were then passed on to consumers. *Id.* at 64a-65a.

**B. The Proceedings Below.**

1. CIG filed this lawsuit in the United States District Court for the District of Wyoming, alleging that NGPL had attempted to monopolize the market for long-distance interstate transportation of Wyoming natural gas, had breached its contract, had breached its duty to perform on the contract in good faith, and had tortiously interfered with CIG's contract with Champlin Petroleum. After an eight-week trial, the jury returned special verdicts for CIG on all counts.

The tortious interference verdict included demand charge losses of approximately $15 million and more than $24 million (later reduced to approximately $8 million) in restitution. In the Judgment, the district court "enter[ed] judgment on . . . the tortious interference claim in the amount of $39,231,072.00." Judgment, at 2 (Nov. 10, 1986; Doc. 578). The court also reduced the total judgment amount for the combined claims because the demand charge losses and certain future lost profits were common to both the tort and antitrust claims. *Id.* The court thereby avoided awarding a double recovery against NGPL. The court expressly stated, however, that it was permitting the jury through special interrogatories to award demand charge damages as part of both the tortious interference verdict and the antitrust verdict so that these damages would stand if either verdict was affirmed on appeal. Tr. 8849-52, 8864.

NGPL and CIG understood that the tort judgment was based on both restitution and demand charge damages. In its motion for judgment n.o.v. and then in its brief in support thereof, NGPL attacked the inclusion of the demand charge losses in the tort judgment. The district court denied NGPL's motion for judgment n.o.v. and reiterated that the tort "award included damages incurred as a result of demand charges." App. 102a.

On the attempted monopolization claim, the district court ruled that (1) "[t]he jury could have concluded that competition actually diminished" (App. at 64a); (2) "a lower priced competitor was excluded in favor of a higher-priced competitor without a corresponding increase in allocative or productive efficiency" (*id.*); and (3) "CIG's exclusion resulted in higher prices to producers, shippers, and consumers of natural gas." *Id.* at 65a. The district court also recognized that CIG had proven a dangerous probability of successful monopolization by showing that NGPL had in fact *succeeded* in exercising monopoly power:

> The weight of the evidence supports the jury's finding that *NGPL possessed the power to control prices and exclude competition.* That evidence showed NGPL's aggressive conduct, CIG's exclusion from the market, the market's vulnerability to increases in transportation prices and that *prices actually increased.* This constitutes sufficient evidence from which the jury could conclude that CIG proved a dangerous probability of success by a preponderance of the evidence.

*Id.* at 76a (emphasis added).[3]

2. The court of appeals reversed on all but the tortious interference claim. The court held that the breach of contract claims were pre-empted. The court also reversed the jury's verdict of attempted monopolization. The court recognized that NGPL's predatory conduct had enabled NGPL both to increase the Trailblazer System's market share to 54% *and* "to charge supracompetitive prices."

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[3] Regarding the element of a dangerous probability that the attempt to monopolize would succeed, the jury was instructed that "a firm must possess market strength—market strength that approaches monopoly power; that is, the ability to control prices and exclude competition." Jury Instr. No. 33 (Doc. 574).

*Id.* at 36a, 39a.[4] Nevertheless, the court of appeals held that this evidence was insufficient to support a claim of attempted monopolization. Such a claim, the court held, requires a showing that the defendant is likely to achieve a higher market share than 54%, typically "between 70 percent and 80 percent." *Id.* at 34a-35a & n.18. The court also rejected the claim because "the Trailblazer System's ability to charge supracompetitive prices" would likely last only six years, at which point "the Trailblazer System would be helpless to compete against the unused and inexpensive capacity of CIG's system." *Id.* at 39a-40a.

The court of appeals affirmed the tort verdict despite NGPL's continued argument on appeal that the tort judgment did not support demand charge damages.[5] At three points, without discussing damage issues, the court simply stated that it was affirming the tort "verdict." App. 16a, 29a, 41a.

CIG filed a petition for a writ of certiorari from this Court based in part on the conflict between the Ninth and Tenth Circuits over the standard for attempted monopolization. After requesting the views of the Solicitor General, 110 S. Ct. 2164 (1990), this Court denied the petition, 111 S. Ct. 441 (1990).

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[4] The court had no illusions about the reprehensible nature of NGPL's actions:

> Natural's predatory conduct consisted of exercising its contract rights with CIG to prevent CIG from offering transportation services to long distance customers. Because Natural reserved a certain amount of space in CIG's pipeline, CIG could not offer that space to others. By continuing to reserve large amounts of gas and taking gas when CIG threatened to sell Natural's capacity, Natural insured that CIG could not offer Natural's reserved capacity to the market.

App. 36a.

[5] NGPL's First Appeal Br. 46 n.37 ("The district court also erred in awarding future *tort damages* for the allegedly useless rights of CIG in Canyon Creek and Overthrust") (emphasis added).

3. On remand, the district court granted CIG's motion to execute the tort judgment. The court held that the tort "verdict" as embodied in its Nov. 10, 1986 Judgment affirmed on appeal required the judgment to include both restitution *and* demand charge damages. App. 48a-50a. It concluded: "The jury awarded damages to CIG for demand charges under two different causes of action, antitrust and tortious interference. CIG could only recover under one. Just because one of the causes of action fails does not mean the plaintiff is not entitled to recover under the remaining cause of action." *Id.* at 50a.

The court of appeals reversed this order. The panel noted that the initial panel had "affirmed the tortious interference part of the district court's decision and judgment," *id.* at 9a, but held that the affirmance limited the damages recoverable to those allocated solely to the tort award *before the antitrust judgment was reversed.* *Id.* at 9a-11a. Thus, CIG could not recover the damages in tort that state law mandated, simply because the trial court had allocated duplicative damages to an award later reversed on appeal.

According to the court of appeals, CIG had defended an antitrust judgment that supported the demand charge damages and could not recover those damages even if they were damages caused by NGPL's tortious conduct. *Id.* at 10a. The court reasoned that the district court had "originally deducted these demand damages because the jury duplicated them in both the tort and antitrust claim awards," and, on remand, the district court was limited to the "ministerial" task of entering the truncated tort award of approximately $8 million in restitution damages, plus post-judgment interest. *Id.* at 11a, 12a.

The court also held that Rule 60(b) did not justify the district court's remand order. It held that Rule 60(b)(6) could not be "used to alter the substantive content of a judgment once it has been affirmed on appeal except in

extraordinary situations." *Id.* at 11a. The court held that this rule applied to bar full recovery on the tort claim even though the contemporaneous antitrust judgment had been reversed.

## REASONS FOR GRANTING THE PETITION

This case presents two issues of broad importance whose resolution by the Tenth Circuit conflicts with decisions of this Court or other courts of appeals. First, the panel's antitrust ruling sets forth an unprecedented and extreme standard regarding the proof required to establish attempted monopolization under Section 2 of the Sherman Act. Because this Court has granted certiorari in another case to resolve this precise issue, see *Spectrum Sports, Inc.* v. *McQuillan*, No. 91-10, the petition should at least be held in abeyance pending resolution of that case.

Second, the panel has crafted a rule that bars full recovery of damages for claims affirmed on appeal, whenever a portion of those damages is allocated to other claims to avoid double recovery, and those other claims are reversed on appeal. This rule conflicts with the established practice of several other circuits, as well as with broader principles mandating full recovery upon claims embodied in a judgment affirmed on appeal. The rule also is wholly inconsistent with Rule 49(a), which provides for the use of special verdicts in multiple claim cases in order to ensure complete recovery of damages awarded by a jury, while avoiding retrial in the event of a partial reversal on appeal.

In addition, the panel's decision marks an unwarranted and harmful departure from established practice under Fed. R. Civ. P. 60(b)(5) and 60(b)(6). Except in the Tenth Circuit, affirmance of a judgment does not preclude relief otherwise available pursuant to Rule 60(b)(6), except for matters clearly resolved on appeal, and Rule

60(b)(5) provides for relief where, as here, recovery upon one claim is dependent upon another judgment later reversed on appeal. The rule that emerges from the Tenth Circuit's decision creates great uncertainty and promises to produce unfair results in a broad range of cases.

I.

This case should be held pending the resolution of No. 91-10, *Spectrum Sports, Inc.* v. *McQuillan*, *cert. granted*, 112 S. Ct. 1557 (1992), which addresses the precise issue of the standard for determining attempted monopolization that also underlies the Tenth Circuit's antitrust determination. The Tenth Circuit set aside an antitrust award in CIG's favor on the ground that the jury and district court erred in determining that NGPL had violated the prohibition in Section 2 of the Sherman Act against attempted monopolization.[6] In *Spectrum Sports*, this Court will address the standard to be applied in Section 2 attempted monopolization cases. The grant of certiorari is limited to a single question:

> Whether a manufacturer's distributor expressly absolved of violating Section 1 of the Sherman Act can,

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[6] It is well established that issues raised upon a previous appeal may be subject to review before this Court after a subsequent appeal because "[a] petition for writ of certiorari can expose the entire case to review." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817-18 (1988); *see Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964) ("We now consider all of the substantial federal questions determined in the earlier stages of the litigation, for it is settled that we may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal") (internal quotations omitted); *see also, e.g., Reece* v. *Georgia*, 350 U.S. 85, 87 (1955); *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912); *Panama R.R.* v. *Napier Shipping Co.*, 166 U.S. 280, 283-84 (1897). This is so even when this Court has denied a petition for a writ of certiorari to review the first appeal. *See, e.g., Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 & n.19 (1979); *Mercer*, 377 U.S. at 153.

> without any evidence of market power or specific intent, be found liable for attempting to monopolize solely by virtue of a unique Ninth Circuit rule?

Petition For A Writ of Certiorari (No. 91-10); 112 S. Ct. 1557 (1992).

Courts of appeals have adopted a variety of positions regarding the proof required to establish attempted monopolization under Section 2. At one extreme is the rule applied by the Ninth Circuit in *Spectrum Sports*. In *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 933 (1964), the Ninth Circuit established that attempted monopolization could be inferred from the defendant's conduct alone and need not be based upon market analysis showing the defendant's probability of actual monopolization.

Other courts of appeals require precisely the market analysis that may be omitted in the Ninth Circuit. Most apply a standard that assesses market power rather than any particular market share. Their rule recognizes that "market share should constitute, at most, a point of departure in assessing the existence of monopoly power," but that "[u]ltimately, that analysis must focus directly on the ability of the regulated company to control prices or exclude competition." *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1107 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). For example, the Second Circuit has stated that proof of market share is not "invariably a requirement of a monopolization claim" and is unnecessary where there is "unambiguous evidence that the defendant has the power to control prices or exclude competition." *Broadway Delivery Corp.* v. *United Parcel Serv., Inc.*, 651 F.2d 122, 130 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981). Focusing upon market power, the Fifth Circuit has found attempted monopolization in circumstances indistinguishable from this case: predatory conduct, a market share of 50%, and the ability to charge

supracompetitive prices for several years. See *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

At the other extreme from the Ninth Circuit's rule is the standard applied to NGPL's conduct by the Tenth Circuit in this case. The Tenth Circuit required a particular showing of market *share* for the exercise of monopoly power (70%-80%, App. 34a & n.18), rather than a showing of market *power*.[7] And it compounded this error by holding that no attempted monopolization claim may lie when supracompetitive prices are charged for a fixed period (in this case, six years). Thus, even though the panel acknowledged that NGPL's conduct made Trailblazer the exclusive transporter of new Wyoming gas and enabled Trailblazer to charge "supracompetitive" prices, the panel employed its extreme rule to set aside the attempted monopolization judgment.

This divergence in standards for proving attempted monopolization clearly indicates that this petition should be held pending the outcome of *Spectrum Sports*. If in that case this Court approves any version of the Ninth Circuit rule, the panel's decision in this case would have

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[7] The extreme nature of the panel's decision is underscored by how the market share figures on which the panel focused (the increase in share from 41% to 54%) do not simply indicate potential monopoly power, but measure NGPL's *success* in achieving market power. The Tenth Circuit expressly recognized that NGPL, by its "tie up of CIG's pipeline capacity," succeeded both in "shift[ing] 13% of the market to the Trailblazer System" and in forcing customers to pay "supracompetitive prices." App. 36a, 39a. Moreover, Trailblazer's 54% share understates Trailblazer's actual power, because NGPL's predatory tactics left Trailblazer as the "one transportation alternative for Wyoming natural gas." *Id.* at 63a. As the only pipeline with available capacity, Trailblazer thus effectively had 100% of the market for new transportation services. Even so, the panel reversed the antitrust judgment because the 54% share was too low and because Trailblazer could charge supracompetitive prices for only six years.

to be reversed upon reconsideration because CIG has clearly met the Ninth Circuit standard. Even if the Court in *Spectrum Sports* adopts the rule of the majority of courts of appeals, remand to the panel would be required. For example, if the Court were to emphasize in *Spectrum Sports* that evidence of market power should guide resolution of an attempted monopolization claim, then the panel's decision, which rested on market share instead, should be reversed on remand. In sum, the reasoning of this Court in *Spectrum Sports* will in all likelihood significantly affect the validity of the Tenth Circuit's holding on the antitrust claim in this case. Under these circumstances, the Court should hold the petition pending its disposition of *Spectrum Sports* and then dispose of the petition as appropriate in light of that decision.

## II.

Even if the Tenth Circuit were correct in its extreme limitations upon Section 2 of the Sherman Act, no justification exists for the panel's subsequent disallowance of damages as found by a jury on CIG's tort claim and awarded in the judgment that was affirmed on appeal. Reversal of one claim is no justification for limiting common damages supported by a surviving claim.

The Tenth Circuit's ruling that limits recovery of damages determined by special verdict for a claim affirmed on appeal, when one of multiple claims containing common damages is reversed, is worthy of this Court's review. The panel's rule denies full recovery of damages upon valid claims, contrary to the rule adopted in other circuits and to general principles of recovery. Further, the panel's rule undermines the function of juries and special verdicts, and will create uncertainty and will guarantee unfair outcomes in multiple claim litigation. Finally, the panel adopted an unprecedented holding concerning the scope of an appellate mandate and departed from estab-

lished doctrine governing the availability of relief pursuant to Fed. R. Civ. P. 60(b).

1. The panel's decision creates a clear conflict among the circuits. The panel disallowed recovery of any damages included in the antitrust award reversed on appeal, even though that result prevented full recovery of demand charge damages that a jury by special verdict also had attributed to the tort claim, that were awarded by the court in the judgment, and that the panel had *affirmed* on appeal. App. 9a-12a.

In direct contrast, the Eleventh Circuit rule is "that where an award of damages is authorized under two alternat[ive] theories of recovery, and the jury's finding of liability on one theory of recovery is supported by the evidence, the verdict and award will be affirmed on appeal." *Stewart & Stevenson Servs., Inc.* v. *Pickard*, 749 F.2d 635, 644-45 (11th Cir. 1984) (reversing one of multiple claims, but upholding damage award supported by surviving claims). Thus, in another case, even though the Eleventh Circuit set aside a claim under 42 U.S.C. § 1981, it upheld the related award of compensatory damages because they could also be attributed to a surviving Title VII claim. See *Sherman* v. *Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir.), *cert. denied*, 111 S. Ct. 353 (1990); cf. *ADP-Financial Computer Servs., Inc.* v. *First Nat'l Bank*, 703 F.2d 1261, 1266-67 (11th Cir. 1983).

The Sixth Circuit employs the same rule: for example, it allowed recovery of damages that had been attributed only to a claim reversed on appeal, on the ground that those damages also could be recovered under surviving claims. See *Pratt* v. *Brown Mach. Co.*, 855 F.2d 1225, 1232 n.9, 1242 (6th Cir. 1988); see also *W.D. Lawson & Co.* v. *Penn Cent. Co.*, 456 F.2d 419, 424 (6th Cir. 1972) (full damages on remaining claim upheld despite reversal of one of two claims); cf. *Zant* v. *Stephens*, 462 U.S. 862 (1983) (reversal of one of several aggravating

circumstances set forth in special verdicts does not require setting aside death penalty, so long as each circumstance would support penalty)."[5] If the rule of these circuits had been applied in this case, CIG would have been able to recover the entire award of damages, including demand charge damages.

The Tenth Circuit's decision is also inconsistent with cases that hold that when one of several claims is set aside, full recovery must be allowed for damages attributable to the claim affirmed on appeal. The Fifth Circuit ordered a new trial after setting aside one of several claims because the original allocation of damages among the different claims would *prevent* the plaintiff's full recovery on the claims that the court of appeals upheld, including an antitrust claim. See *Video Int'l Prod., Inc.* v. *Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1080, 1085-86 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989); see also *Mercer* v. *Long Mfg. N.C., Inc.*, 671 F.2d 946, 949 (5th Cir. Unit A 1982) ("Had the special interrogatories in the original trial been framed in such a manner that the assessment of damages had been segregated for each theory of liability, we would willingly affirm both the finding of liability under strict liability and the award of damages"). In *Ryko Manufacturing Co.* v. *Eden Services*, 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988), a jury found liability on antitrust, fraud, and breach of contract claims, but awarded damages only pursuant to the antitrust claim. On appeal, the Eighth Circuit reversed the antitrust claim, but directed retrial on the fraud and contract claims. The Court directed retrial on the contract claims *because* the judgment

[5] The Third Circuit has applied an even more aggressive rule: it upheld a damage award linked solely to a claim reversed on appeal, on the ground that the damages were supported by a related claim presented to, but not expressly passed upon by, the jury. *See In re Merritt Logan, Inc.*, 901 F.2d 349, 353, 363-64 (3d Cir. 1990).

had contained no damages separately attributable to the contract claim. *Id.* at 1239. See also *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 279-90, 299-304 (2d Cir. 1979) (Sherman Act Section 2 claim and related damage award set aside, but retrial ordered to allow full recovery of damages on alternative, Section 1 claim upheld on appeal), *cert. denied*, 444 U.S. 1093 (1980).[9]

At bottom, these circuits would allow a plaintiff in CIG's position to recover the full amount of damages attributable to conduct such as NGPL's. Under the Tenth Circuit's rule, plaintiffs in these cases would have recovered only damages that had not been initially attributed to the claim reversed on appeal.

2. The Tenth Circuit's rule also marks an unjustified departure from other circuits' treatment of Rule 49(a) and from their use of special verdicts. In this case, the jury found by special verdict—which the trial court held was supported by substantial evidence—that CIG suffered more than $23 million in damages from NGPL's tortious interference with contract. Rule 49(a) provides for special verdicts to operate in precisely these circumstances to allow the appellate court to set aside only that portion of the damage award attributable solely to the claim reversed on appeal.

> The purpose of a Rule 49(a) special verdict is to avoid confusion, appellate uncertainty and the need

[9] *See also Calamia* v. *City of New York*, 879 F.2d 1025, 1036 (2d Cir. 1989) (damage award set aside to allow full recovery on affirmed claims when one of multiple claims reversed, only because no special verdicts existed to allow affirmances of full award on remaining claim); *Jones* v. *Miles*, 656 F.2d 103 (5th Cir. Unit B 1981) (same); *Albergo* v. *Reading Co.*, 372 F.2d 83, 85-86 (3d Cir. 1966) (same), *cert. denied*, 386 U.S. 983 (1967); *MCI Communications Corp.* v. *American Tel & Tel. Co.*, 708 F.2d 1081, 1168 (7th Cir.) (several of multiple monopolization counts found to be without basis, requiring retrial of damages to ensure recovery upon affirmed counts), *cert. denied*, 464 U.S. 891 (1983).

> for additional proceedings by identifying the bases on which the jury rendered its verdict. In cases such as this, involving multiple, alternative theories of recovery, the Rule 49(a) special verdict has been described as a 'wonder to behold.' Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 344 (1967). This is so because the use of a special verdict in multiple theory of recovery cases eliminates the uncertainty as to whether the jury's verdict was based wholly on an improper theory requiring retrial of the case, as with a general verdict, and 'reveals the whole case for what it is, both fact and law, for complete and final acceptance of the correct legal theory by the reviewing Court.' [*Id.*], at 345.

*Stewart & Stevenson Servs., Inc.*, 749 F.2d at 644 (citations omitted); see *Gainesville Utils. Dept.* v. *Florida Power & Light Co.*, 573 F.2d 292, 294 n.3 (5th Cir. 1978) (citing cases). Other circuits, too, have given this full effect to special verdicts in similar circumstances.[10]

The Tenth Circuit's rule conflicts with this approach to special verdicts and entirely destroys their utility. See, *e.g.*, *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962) (appellate courts must give special verdicts full effect unless they are in irreconcilable conflict); *Robles* v. *Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir.) (citing cases), *cert. denied*, 490 U.S. 1051 (1989); *Morris* v. *Pennsylvania R.R.*, 187 F.2d 837, 840-41 (2d Cir. 1951) (citing cases); cf. *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 119-22 (1963). Here, the special verdicts returned permitted the court of appeals (or district court on remand) to assess precisely the full extent of CIG's damages from

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[10] *See, e.g., supra*, pp. 16-18; *cf. Rheuport* v. *Ferguson*, 819 F.2d 1459, 1464 (8th Cir. 1987); *Walker* v. *Pettit Constr. Co.*, 605 F.2d 128, 131, *reh'g*, 611 F.2d 950 (4th Cir. 1979); *Pritchard* v. *Liggett & Myers Tobacco Co.*, 370 F.2d 95, 95-96 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

NGPL's tortious conduct—without any retrial. See App. 113a-114a.

Had the jury returned a general verdict instead, CIG in other circuits at least would have had the opportunity on remand to prove and to recover all of its tort damages. Under the Tenth Circuit's rule, the trial judge's commendable use of special verdicts, and the resulting elimination of duplicated damages to prevent double recovery on the antitrust and tort claims, bars CIG altogether from recovering the specially found tort damages. Thus, the panel converted a procedure designed to prevent double recovery—in accord with Rule 49(a) and with the approval of all parties and the district court—into a mechanism that disallows full recovery upon a claim upheld on appeal.

More generally, the panel's decision threatens the orderly operation of federal multiclaim litigation. Many federal rules of civil procedure are designed to join together, and thus to resolve in a single proceeding, all related claims among a particular set of litigants. See, *e.g.*, Fed. R. Civ. P. 13, 18, 49; see also Fed. R. Civ. P. 12, 14. The panel's rule attacks this entire undertaking by denying full recovery on particular claims when multiple claims are joined. For example, CIG clearly would have recovered the full damages attributable to its tort claim had it pursued that claim separately from the antitrust claim. Yet, the panel's rule denies CIG recovery of those damages, simply because it appropriately combined the tort and antitrust claims. This result will disrupt the orderly functioning of multiclaim litigation and create incentives for parties and district courts to avoid consolidating claims and parties.

3. The Tenth Circuit's rule creates great uncertainty concerning a recurring issue of law, and will be unfair and unworkable in practice. Only in the Tenth Circuit,

successful plaintiffs will have to cross-appeal to protect claims on individual awards whenever district courts allocate common damages to a single claim to prevent double recovery.[11] This is so even when, as in CIG's case, the plaintiff has absolutely no quarrel with the district court's resolution of the case. And the defendant is in no way prejudiced by the procedure followed by the district court in this case and by other circuits. Nevertheless, cross-appeal will be necessary because, otherwise, the plaintiff risks losing recovery of all common damages, no matter how great the damages that would have been allowed under the affirmed claim alone.

The panel's determination creates additional uncertainty because, now, the bare affirmance of a claim may conclusively resolve damage issues contrary to the district court's own understanding of its judgment.[12] This Court has long established that an appellate court's mandate gov-

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[11] Additionally, the panel suggests that relief might be had by seeking rehearing or recall of the mandate. App. 9a n.3. Of course, CIG had no notice that the initial panel's repeated reference to affirmance of the "verdict," which included demand charge damages, in fact disallowed recovery of those damages. With the panel's new rule, however, plaintiffs must always seek rehearing whenever any ambiguity might exist regarding the relief afforded by the affirmed judgment. These superfluous cross-appeals and rehearing petitions will burden the courts of appeals and unnecessarily impede the efficient resolution of disputes. *Cf. Standard Oil Co.* v. *United States*, 429 U.S. 17 (1976) (no appellate court permission needed to grant Fed. R. Civ. P. 60(b) motion); *infra* p. 25.

[12] The initial panel decision did not address the scope of the tort judgment beyond its repeated affirmance of the "verdict" (which indisputably included demand charge damages). Indeed, the panel in the second appeal admitted that, in its first decision, "[t]his Court *never addressed* the propriety of awarding the demand charge payments as tort damages." App. 11a (emphasis added, quotation omitted). Yet, that panel held that the initial decision in fact barred recovery of demand charge damages, contrary to the district court's understanding of its own judgment (and of the initial panel decision). App. 9a-12a.

erns only issues "directly in issue" and necessarily resolved; "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939). "The doctrine of law of the case comes into play only with respect to issues previously determined." *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979). Until this case, courts of appeals have consistently limited the mandate rule, and related doctrine of law of the case, to issues decided on appeal "expressly or by necessary implication." *Piambino* v. *Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).[13]

The Tenth Circuit's treatment of the mandate abandons the great advantage of the *Sprague* rule, which is that the appellate opinion clearly communicates to all parties and the district court which issues have been definitively resolved. In cases such as this, where the court of appeals reverses one of multiple claims, the parties and district court will act at their peril regarding the extent of recovery that the surviving claims will support. Even for simple affirmances of claims, the extent to which the court

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[13] *See also, e.g., Jones* v. *Lewis*, 957 F.2d 260, 262 (6th Cir.), *petition for cert. filed* (U.S. May 26, 1992) (No. 91-8404); *Borchers* v. *Commissioner*, 943 F.2d 22, 23 (8th Cir. 1991); *Exxon Corp.* v. *United States*, 931 F.2d 874, 877 (Fed. Cir. 1991) (and cases cited); *Luckey* v. *Miller*, 929 F.2d 618, 621 (11th Cir. 1991) (and cases cited); *Parts & Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 866 F.2d 228, 231-32 (7th Cir. 1988) (and cases cited), *cert. denied*, 493 U.S. 847 (1989); *Smith* v. *Bounds*, 813 F.2d 1299, 1306 (1987), *reh'g*, 841 F.2d 77 (4th Cir. 1988), *cert. denied*, 488 U.S. 869 (1988); *Newball* v. *Offshore Logistics Int'l*, 803 F.2d 821, 826 (5th Cir. 1986); *Panama Processes, S.A.* v. *Cities Serv. Co.*, 789 F.2d 991, 994 (2d Cir. 1986); *Bankers Trust Co.* v. *Bethlehem Steel Corp.*, 761 F.2d 943, 950 (3d Cir. 1985) (and cases cited); *Maggard* v. *O'Connell*, 703 F.2d 1284, 1289 (D.C. Cir. 1983); *Beltran* v. *Myers*, 701 F.2d 91, 93 (9th Cir.), *cert. denied*, 462 U.S. 1134 (1983).

of appeals has fixed damages or resolved related damage issues will always remain in doubt.

The panel's decision also imposes what is in essence a novel federal election of remedies requirement upon the formulation and appeal of a judgment containing multiple claims. The panel reasoned that CIG should not be allowed tort damage recovery because "CIG had the demand charges within the antitrust damages award" and "vigorously fought through that [initial appeal] to sustain that judgment and arrangement of the damage award." App. 10a. This innovation is unsound: election of remedies requirements serve to prevent double recovery of damages—the very result directly obtained by the procedure followed by the district court in this case and by other circuits generally. The panel's newly crafted rule does nothing but unfairly deprive plaintiffs (including CIG) of damages granted by jury verdicts and approved in district court decisions affirmed as to that verdict on appeal.

4. Rule 60(b), relied upon by the panel, is relevant to full recovery upon the tort claim only to the extent that relief from the judgment is required; CIG argues, of course, that the affirmed verdict and judgment already support award of the demand charge damages. See *supra* pp. 15-23. Even so, the Tenth Circuit's interpretation of Rule 60(b) also departs from the governing rules established by this Court and other courts of appeals, and the panel's novel requirement will bar full recovery in a broad range of cases.

The panel's decision reimposes a long-abandoned and improper restriction on the operation of Rule 60(b)(6). The panel determined that "Rule 60(b)(6) cannot be properly used to alter the substantive content of a judgment once it has been affirmed on appeal except in extraordinary situations," and "[f]ollowing appellate disposition . . . the judgment is no longer subject to district court

amendment beyond the ministerial dictates of the mandate." App. 11a-12a.

Contrary to the panel's decision, affirmance of a judgment does not restrict relief otherwise available pursuant to Rule 60(b). Prior to 1976, the courts of appeals were divided on the question whether leave must be had of the court of appeals before a district court could provide relief from an affirmed judgment. This Court resolved this issue by holding that leave was not required because affirmance of a judgment did not alter the availability of relief pursuant to Rule 60(b). *Standard Oil Co.* v. *United States*, 429 U.S. 17 (1976) (per curiam). The interest in finality was no greater after affirmance than before and, "[l]ike the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence the district judge is not flouting the mandate by acting on the motion." *Id.* at 18. Since *Standard Oil Co.*, courts have routinely applied the same Rule 60(b) standard to judgments affirmed by prior appeal that is applied to initial judgments.[14]

The panel's conclusion that relief from judgment could be had, if at all, pursuant to Rule 60(b)(6) is also contrary to the accepted operation of Rule 60(b)(5), which requires relief in the circumstances presented by this case.[15]

Rule 60(b)(5) supports relief from the tort judgment, to include the demand charge damages, because the

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[14] *See, e.g., Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988); *Panama Processes, S.A.*, 789 F.2d at 993-99. *Cf. Board of Educ.* v. *Dowell*, 111 S. Ct. 630 (1991).

[15] Rule 60(b)(5) provides for relief from judgment when "the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

"prior" antitrust judgment was reversed. In contrast to the Tenth Circuit panel, the Fourth Circuit has set forth the rule that a judgment is "prior" for purposes of Rule 60(b)(5) when it is legally precedent to or forms the basis of another judgment, even when the judgments are contemporaneous. See *Werner* v. *Carbo*, 731 F.2d 204, 207-08 (4th Cir. 1984); *Pierce Oil Corp.* v. *United States*, 9 F.R.D. 619 (E.D. Va. 1949) (Rule 60(b) supported restoration of common damages to judgment after reversal of contemporaneous judgment to which common damages were allocated). Several circuits have established that it is an abuse of discretion *not* to modify a dependent, contemporaneous judgment once the predicate judgment has been reversed on appeal. See *Werner*, 731 F.2d at 206, 209; cf. *Michigan Surety Co.* v. *Service Mach. Corp.*, 277 F.2d 531 (5th Cir. 1960); *Jackson* v. *Jackson*, 276 F.2d 501 (D.C. Cir.), *cert. denied*, 364 U.S. 849 (1960).[16] The Tenth Circuit has now established that it is reversible error to *modify* the dependent judgment following reversal of the predicate judgment.

The Tenth Circuit's treatment of Rules 60(b)(5) and 60(b)(6) directly affects plaintiffs' ability to recover the full damages attributable to claims affirmed on appeal. Whenever a district court's construction of damages makes full recovery under one claim dependent in any manner upon affirmance of another claim, the Tenth Circuit rule will stand as a potential obstacle to the recovery mandated by the federal or state claim affirmed on appeal. The proper interpretation of a fundamental rule of civil procedure on which the courts of appeals disagree is the quintessential issue requiring review by this Court.

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[16] The usual practice is to adjust the dependent decision on appeal when the predicate judgment is altered, *see, e.g.*, *Butler* v. *Eaton*, 141 U.S. 240 (1891), but the district court may make that adjustment upon remand if the court of appeals does not do so. *See* 7 J. Moore, *Moore's Federal Practice* ¶ 60.26[3], at 60-248 (1992).

## CONCLUSION

The petition for a writ of certiorari should be granted or, at a minimum, the petition should be held pending this Court's disposition of *Spectrum Sports, Inc.* v. *McQuillan*, No. 91-10.

Respectfully submitted,

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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No. 90-8046

COLORADO INTERSTATE GAS COMPANY,
*Plaintiff-Counterclaim Defendant-Appellee,*

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA and NGPL-TRAILBLAZER, INC.,
*Defendants-Counterclaimants-Appellants,*

v.

WYOMING INTERSTATE COMPANY, LTD., and the COASTAL CORPORATION,
*Counterclaim Defendants-Appellees.*

MIDCON VENTURES, INC.,
*Counterclaimant.*

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May 6, 1992

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Before HOLLOWAY and BARRETT, Circuit Judges, and BROWN,* District Judge.

* The Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

HOLLOWAY, Circuit Judge.

This is the second appeal to this court by defendants, Natural Gas Pipeline Company of America and NGPL-Trailblazer (collectively Natural), following an order of the United States District Court, District of Wyoming, entering judgment in favor of the plaintiff, Colorado Interstate Gas Company (CIG). *See Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 661 F.Supp. 1448 (D. Wyo.1987) (*CIG I*), *rev'd in part and aff'd in part*, 885 F.2d 683 (10th Cir.1989) (*CIG II*). In this most recent appeal, Natural argues, *inter alia*, that the district court erred on remand in determining that Colorado law, rather than Wyoming law governs CIG's pendent state law tort claim against Natural.

## I. Background

CIG and Natural are competing owners of pipelines which transport natural gas. For many years, Natural has purchased gas from CIG transporting it to states in the midwest and east. In 1981-82 a new pipeline, the Trailblazer System, was constructed to transport newly discovered reserves of natural gas out of the Overthrust region of Wyoming. The Trailblazer System is composed of three connected segments of pipeline. CIG and its affiliates have ownership interests in the two westernmost segments, the Overthrust and the WIC pipelines. Natural owns a one-third interest in the third, easternmost segment of the Trailblazer System, the Trailblazer Pipeline.

Under an existing contract, CIG had agreed to purchase gas from Champlin Petroleum's Whitney Canyon reserves in the Overthrust region (the Whitney Canyon contract). CIG transported this gas through the two western pipeline sections in the Trailblazer System to its own offshoot pipeline which intersects the system at a point west of Natural's Trailblazer pipeline.

In July 1982, CIG and Natural entered into a contract (the Service Agreement) which required CIG to deliver

and Natural to purchase specified quantities of natural gas from the Overthrust area. The Service Agreement set forth how much gas Natural was required to purchase and also contained a minimum bill provision. Because the Service Agreement involved the interstate sale of nautral gas, the rates and terms specified required approval by the Federal Energy Regulatory Commission (FERC). In a proceeding before that body, FERC modified the terms of the Service Agreement to reduce the price Natural had to pay for unpurchased gas.

In July 1983, Natural sharply reduced its gas purchases from CIG, choosing instead to pay CIG for the unpurchased gas at the lower FERC mandated rate. Natural then purchased gas from other sources to replace lost volumes from CIG, often paying more for the gas. Under the Service Agreement, CIG was obligated to be ready to deliver volumes of gas requested by Natural. Thus, CIG could not use the pipeline capacity reserved for Natural to ship gas for other customers. Moreover, Natural occasionally resumed purchases of gas from CIG when CIG sought to sell gas to new customers, terminating these purchases after the new customers went elsewhere. Due to the oversupply of gas in CIG's system created by Natural's refusal to take gas, CIG was forced to stop purchasing gas from some of its suppliers. One of these suppliers was Champlin Petroleum (Champlin).

Despite its refusal to purchase gas from CIG, Natural negotiated with Champlin to acquire the Whitney Canyon reserves. In the ensuing discussions, Natural agreed to an increase in the purchase price for Champlin gas if Champlin obtained a release of CIG's rights to the gas under the Whitney Canyon contract. When CIG attempted to negotiate revisions to that contract because of its inability to take Champlin gas, Champlin insisted that CIG release its rights. CIG acceded. The next day, Natural bought Champlin's Whitney Canyon gas, although it still

refused deliveries from CIG. Natural shipped the Whitney Canyon gas through the Trailblazer Pipeline.

## II. Prior Proceedings

CIG brought this action alleging that Natural violated federal antitrust laws by attempting to monopolize the market for the long-distance transportation of Wyoming natural gas, that Natural conspired to monopolize that market, that Natural breached the Services Agreement and its duty of good faith and fair dealing, and that Natural tortiously interfered with CIG's contractual relations with Champlin.

In *CIG I*, the jury awarded CIG $724,033,361 in damages based on CIG's antitrust, breach of contract and tortious interference with contractual relations claims. Following deduction for duplicative awards, the district court reduced the total jury award to $412,237,972, and entered judgment for CIG on that amount. Natural appealed.

In *CIG II*, a panel of this court reversed the antitrust and breach of contract verdicts. *See CIG II*, 885 F.2d at 697. However, the panel affirmed the verdict for tortious interference with contractual relations, rejecting Natural's assertion that the award interfered with FERC's authority. *See id.* at 690-91.

Accordingly, we remanded to the district court to enter judgment on the tort award alone. Our mandate, expressed in our judgment and opinion, was that the district court's judgment was affirmed in part and reversed in part, concluding: "[t]he cause is remanded to the United States District Court for the District of Wyoming to enter judgment in accordance with the opinion of this court."

## III. On Remand

Returning to the district court, CIG moved to have $15,204,555 in demand charges awarded by the jury in

the original verdict reinstated in the new judgment required by the remand. In *CIG I*, the district court had entered judgment on the tort award for $39,231,072, but reduced this award to $24,026,517 "because the jury awarded Colorado Interstate . . . demand charge losses ($15,204,555) under the attempt to monopolize and tortious interference claims[.]" I R. Doc. 578 at 2.[1] CIG had apparently agreed to have the demand charges listed under the antitrust award, thus benefitting from the treble damages permitted by the statute.

Over Natural's objections, the district court agreed to reinstate the demand charges of $15,204,555 in the judgment on the tort award. The court stated that its Judgment of November 10, 1986, "made it clear that the tortious interference award included damages for restitution and for demand charges." Order on Post Appeal Motions, II R. Doc. 694 (Pleadings) at 12, 15 ("Remand Order"). The court noted that it had specifically withheld a jury instruction prohibiting duplicative awards "so that in the event any one count failed there could be a complete answer by the jury on the other counts[.]" *Id.* The court concluded that CIG was entitled to recover the demand charges because the jury intended that it should and the only reason for deducting them at all was "to avoid duplicative damages on two different causes of action[.]" *Id.* at 13, 15.

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[1] Additionally, in *CIG I*, the district court further reduced the remaining $24,026,517 of restitution damages in the tort award (after deducting the demand charges) by two-thirds to reflect the fact that Natural owned only one-third of the Trailblazer Pipeline Company and received only one-third of the funds in question. *See CIG I*, 661 F.Supp. at 1479. Thus, in *CIG II*, the tort award appealed to this court then totalled $8,008,839. *See CIG II*, 885 F.2d at 691 n. 12.

Although this court's original opinion incorrectly made reference to $8,000,839 in restitutionary tort damages, *see CIG II*, 885 F.2d at 691 n. 12, the actual amount of tort damages awarded by the district court and affirmed by this court is $8,008,839. *See CIG I*, 661 F.Supp. at 1479.

By an opposing motion, Natural sought to have the tort judgment set aside *in toto* on the basis of an intervening decision by the Wyoming Supreme Court, *Price v. Sorrell*, 784 P.2d 614 (Wyo.1989), which was decided after *CIG II*. Natural argued that *Price* required the district court to enter judgment against CIG because Wyoming had now made clear that it refused to adopt § 766A of the Restatement (Second) of Torts (1979), the basis of CIG's tort claim. Natural argued that since federal courts are obliged to apply the most recent controlling state court decision on state substantive law, Natural was entitled to judgment on the state law tort claim because the district court had found Wyoming law to govern, and that law would not allow such tort recovery.

The district court conceded that in *CIG I* it had stated that "Wyoming would recognize a cause of action under § 766A." Remand Order at 6 (quoting *CIG I*, 661 F.Supp. at 1449). The court also acknowledged that the *Price* case demonstrated that its *CIG I* "prediction proved wrong." *Id.* at 7. Nevertheless, the court stated:

> this Court disputes Natural's contention that Wyoming substantive law applies. This Court never carefully considered whether Wyoming or Colorado law applied in this instance since, at that time, neither Colorado nor Wyoming courts had addressed the adoption or rejection of § 766A. So by default, this Court applied what it presumed Wyoming law would be. The situation has changed, however, with Wyoming rejecting § 766A in *Price* and Colorado adopting § 766A in *Westfield Development Co. v. Rifle Investment Associates*, [786 P.2d 1112 (Colo.1990)].

Remand Order at 7-8. Accordingly, the court conducted a choice of law analysis.

The court observed that Wyoming applies the rule of *lex loci delicti* in tort cases, which requires application of "the substantive law of the state where the harm or

injury to the plaintiff occurs[.]" *Id.* at 8. Assuming that the place of the wrong was "where the last event necessary to make an action liable for an alleged tort" took place, Restatement (First) of Conflicts § 377 (1934), the court held that:

> the last element of a tort cause of action is damages. . . . In a physical injury tort claim, damages generally are incurred in the state where the plaintiff is physically injured by the defendant. In this instance, the injuries inflicted were financial. Defendants tortiously interfered with CIG's ability to conduct its business. 'The "last event necessary" in this tort is the construction of plaintiff's opportunities, and that occurs where the plaintiff experiences it, i.e., his place of residence.' *Cesnik v. Chrysler Corp.*, 490 F.Supp. 859, 872-73 (M.D.Tenn.1980). . . . Moreover, even if one were to look at the actions taken by the parties, the last event necessary for liability to be imposed upon Natural, was Natural's agreement to purchase gas from Champlin Petroleum, the same gas Natural forced CIG to give up. This agreement took place in Colorado, not Wyoming.
>
> Under this analysis, the Court now finds that Colorado substantive law applies to CIG's tortious interference with a contract claim. Colorado, as contrasted with Wyoming, recognizes § 766A causes of action. Accordingly, CIG's tort claim is still valid.

Remand Order at 9-10 (citations omitted).

By an order filed March 26 1990, the district court entered judgment on the tort claim in favor of CIG for $23,213,394 in damages. The court added $4,827,129 in post-judgment interest pursuant to the 5.75% rate set in the original November 10, 1986 judgment order. The court's order set a new post-judgment interest rate of 8.36% to run from the date of its new judgment. By order of April 6, 1990, the court denied Natural's motions for a new trial and JNOV. Natural then timely appealed.

## IV. Discussion

On appeal Natural makes a number of arguments: 1) the district court erred in its choice of law analysis; 2) the court improperly awarded demand charge damages because such damages are preempted by FERC's authority, violate the filed rate doctrine, and are based on false evidence presented at trial; 3) the district court erred in applying post-judgment interest at two different rates; 4) the court erred by applying interest on the demand charges dating back to the original judgment. We need not reach these arguments, however, because the district court's error was more fundamental—the court acted beyond the scope of our mandate and accorded relief not available on post affirmance remand.

On remand, both parties moved to have the district court alter the scope of the tort judgment which this court had affirmed in *CIG II*. We conclude that the district court could not properly act on either motion, and accordingly vacate and remand for an entry of ju .gment in favor of CIG on the tort award for $8,008,839, in accord with our clear mandate and our judgment affirming that award. *See* 885 F.2d at 691 and n. 12, 697.

### A. CIG's Motion to Revise the Tort Judgment Amount

After this court's decision in *CIG II*, CIG moved to have the district court declare that the tort judgment is for $23,213 394 plus post-judgment interest.[2] Although

[2] CIG apparently also moved pursuant to Fed.R.Civ.P. 54(b) to have the tort judgment restated as a separate award. As indicated in the text above, however, we construe this motion as one actually brought pursuant to Rule 60(b)(6). Rule 54(b) was not a proper vehicle for this request because the rule is designed to permit a party to gain an immediate appeal of a severable portion of multiple claim litigation. Moreover, after our disposition in *CIG II*, the precondition to use of Rule 54(b), that there be "more than one claim for relief" presented to the district court did not exist. Our decision in *CIG II* eliminated all of CIG's causes of action except

not stylized as such, we must construe this motion to be pursuant to Fed.R.Civ.P. 60(b). In *CIG II*, we affirmed the tortious interference part of the district court's decision and judgment, and remanded with instructions "to enter judgment in accordance with the opinion of this court." II R. Doc. 679 at 2. By this action, the tort portion of the district court's original judgment became final, with only the ministerial function remaining of entry of a corrected judgment therefor.

As a result, there were very few options available to CIG to have the district court's judgment changed in any way.[3] CIG's motion could not properly have come pursuant to Rule 59(e), to alter or amend the judgment, because it was out of time. In our view, Rule 60(b) appears to provide the only vehicle by which CIG could have possibly presented its request that the district court reinstate the demand charges into the tort judgment.

Rule 60(b), however, only provides relief from judgment under certain specified conditions. The Rule provides that:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

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the affirmed tort award. Thus, there was nothing from which the tort award could be declared separate.

[3] As an aside, CIG could have, but did not, seek rehearing or to have this court recall its mandate for any correction it thought was necessary to the district court's judgment. CIG, instead, filed a petition for certiorari in the Supreme Court. This petition was denied.

> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Of the reasons listed, the only one possibly applicable to the facts of this case is number (6), which permits relief for "any other reason justifying relief." In *Collins v. City of Wichita*, 254 F.2d 837 (10th Cir.1958), we noted that "*in extraordinary situations*, relief from final judgment may be had under Rule 60(b)(6), when such action is appropriate to accomplish justice." *Id.* at 839 (emphasis added). Based on the facts before us, we must conclude that the relief sought by CIG—a change in the content of the judgment affirmed by this court—is unsupported by an extraordinary reason to justify relief.

Before the district court originally imposed its judgment, the demand charges were removed from the tort portion of the judgment, with the result that CIG had this amount trebled as part of the antitrust damages under 15 U.S.C. § 15 (1914). Thus, as the prior appeal came to us in *CIG II*, CIG had the demand charges within the antitrust damages award in its favor, with the benefit of trebling. CIG vigorously fought through that appeal in *CIG II* to sustain that judgment and arrangement of the damage award, but unfortunately for CIG, it lost when the antitrust judgment was rejected by this court. *CIG II*, 885 F.2d at 697. We cannot agree that these circumstances furnish a basis for extraordinary relief from the judgment we affirmed.

Additionally, we believe that concerns of finality dictate that the district court must be circumscribed by our mandate. *See Collins*, 254 F.2d at 839 (noting that

"[l]itigation must end sometime"). As we noted in *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 969 (10th Cir.1991), "[t]o decide whether the district court violated the mandate, it is necessary to examine the mandate and then look at what the district court did." Here, the district court originally deducted these demand damages because the jury duplicated them in both the tort and antitrust claim awards. *See* I R.Doc. 578 at 2. In its later opinion denying Natural's motion for JNOV, the court again stated that following CIG's acceptance of the ordered remittitur, "[t]he sum owed by [Natural] totals $8,008,839[,]" *CIG I*, 661 F.Supp. at 1479, this figure being the one-third of the $24,026,517 restitutionary tort award given to CIG of profits of Trailblazer Pipeline Company. Thus, we must agree with Natural that "[t]his Court never addressed the propriety of awarding the demand charge payments as tort damages." Appellant's Reply Brief at 19.

Our mandate to the district court instructed it to enter judgment on the tort award that was before this court in *CIG II*. The rule is well established that a district court must comply strictly with the mandate rendered by the reviewing court. *See Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 584-85 (D.C.Cir.1980) (district court has "no power to reconsider issues laid to rest" on prior appeal). As a corollary to this rule, we are convinced that Rule 60(b)(6) cannot be properly used to alter the substantive content of a judgment once it has been affirmed on appeal except in extraordinary situations. To hold otherwise would be to permit a district court to violate our mandate that a judgment be entered "in accordance with the opinion of this court." II R.Doc. 679 at 2. Having thoroughly reviewed the briefs submitted in the first appeal and the careful decision in *CIG II*, we believe the panel in *CIG II* intended to, and did, resolve all the issues presented to it. Accordingly, a second appeal should not now be entertained to challenge the affirmed tort award.

We are unable to find any authority for revision of a judgment as was made here, and none is cited. A suit is deemed " 'pending until the appeal is disposed of,' and until disposition any judgment appealed from it is still *sub judice*." *de Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C.Cir.) (quoting *Mackenzie v. A. Engelhard & Sons Co.*, 266 U.S. 131, 142-43, 45 S.Ct. 68, 69, 69 L.Ed. 205 (1924)), *cert. denied*, 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed.2d 220 (1972); *Nicastro v. United States*, 206 F.2d 89, 92 (10th Cir.1953). Following appellate disposition, however, the judgment is no longer subject to district court amendment beyond the ministerial dictates of the mandate, which encompasses the full scope of jurisdictional power granted to the district court on remand. Accordingly, we vacate the district court's decision to grant CIG's motion to reinstate the demand charges removed from the tort judgment entered on November 10, 1986.

B. Natural's Motion to Apply Intervening State Law

For similar reasons, we also reject Natural's contention that the choice of law issue cannot be avoided. Natural argues that the district was required to apply *Price v. Sorrell* because the Supreme Court has declared that "until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court." *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543, 61 S.Ct. 347, 350, 85 L.Ed. 327 (1941). *See also Huddleston v. Dwyer*, 322 U.S. 232, 236, 64 S.Ct. 1015, 1017, 88 L.Ed. 1246 (1944). As mentioned above, however, we conclude that the question of which state law properly applied was no longer *sub judice* after this court disposed of the appeal in *CIG II* and the time for a petition for certiorari had passed.

More importantly, for the same reasons that we believe CIG's motion must come, if at all, under Rule 60(b)(6),

we also conclude that Natural's motion is controlled by that rule.[1] Over thirty years ago, this court held in *Collins* that "[a] change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies relief" under Rule 60(b). *Id.* at 893; *but cf*, *Pierce v. Cook & Co.*, 518 F.2d 720, 722-23 (10th Cir.1975) (*en banc*) (finding extraordinary circumstances where the change in law arose out of the same accident in which the plaintiffs had been involved), *cert. denied*, 423 U.S. 1079, 96 S.Ct. 866, 47 L.Ed.2d 89 (1976). The *Collins* holding is still the rule in this circuit. *See Van Skiver v. United States*, 952 F.2d 1241, 1244-45 (10th Cir.1991). Thus, Natural had no basis on which it could have asked the district court to apply the *Price* case: this case was already over for purposes of selecting the governing law.

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[1] We note that Natural also argued to the district court on remand that CIG had possibly perpetrated a fraud or misrepresentation on the court with respect to these demand charges. CIG recovered these charges because it proved at trial that it could not use its rights to the Canyon Creek and Overthrust facilities without the Champlin gas misappropriated by Natural. Natural alleged that immediately after trial, CIG began using these allegedly "useless" facilities and profiting thereby. Natural apparently made this assertion to the district court after trial, and renewed it on remand.

In its order on remand, the district court noted that Natural proffered an affidavit of CIG's Vice President which stated that CIG had shipped some gas through the facilities. The court noted, however, that the same affidavit showed that the shipped gas belonged to a third party, not CIG, and that the revenue received was minimal. The district court held that "[t]he evidence does not support Natural's contention of inequity." Remand Order at 15.

To the extent that this motion properly comes within Rule 60(b)(3)'s provision for fraud, misrepresentation or misconduct of another party, we believe the district court could properly have entertained this argument on remand had there been demand charges remaining in the affirmed tort award. However, the elimination of the demand charge damage award in *CIG II* mooted this issue so it need not have been reached either.

Accordingly, the revised judgment of the district court entered March 26, 1990, now on appeal, must be VACATED; the case is REMANDED with instructions for entry of judgment in favor of CIG on its tort award for $8,008,839, plus post-judgment interest to run from November 10, 1986.

## APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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Nos. 87-2109, 87-2123

COLORADO INTERSTATE GAS COMPANY,
*Plaintiff/Counterclaim-Defendant/Appellee,*

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA;
NGPL-TRAILBLAZER INC.,
*Defendants/Counter-Claimants/Appellants.*

v.

WYOMING INTERSTATE COMPANY, LTD.;
the COASTAL CORPORATION,
*Counterclaim-Defendants/Appellees.*

MIDCON VENTURES, INC.,
*Counterclaimant.*

FEDERAL ENERGY REGULATORY COMMISSION,
*Amicus Curiae.*

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Sept. 11, 1989

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Before MOORE, ANDERSON, and BALDOCK, Circuit Judges.

JOHN P. MOORE, Circuit Judge.

This is an appeal from an order of the district court refusing to grant judgment notwithstanding the verdict or a new trial for the defendants, Natural Gas Pipeline Company of America (Natural) and NGPL-Trailblazer.

661 F.Supp. 1448. The jury awarded the plaintiff, Colorado Interstate Gas Company (CIG), $724,033,361 in damages based on CIG's claim that Natural attempted to monopolize the market for long distance transportation of Wyoming gas, breached its contract with CIG, and tortiously interfered with CIG's contractual relations. While the district court reduced the jury award to $412,237,972, Natural argues that the district court failed to rectify the underlying legal errors on which the judgment was based.

Natural deploys a two-pronged attack against each of CIG's claims. First, it asserts that the award of damages for conduct approved by the Federal Energy Regulatory Commission (FERC) impermissibly interferes with FERC's authority to regulate gas sales and transportation markets. Second, Natural argues, in the alternative, that the substantive law of contracts, torts, and antitrust, requires the reversal of the jury's verdict on each claim. We hold that in light of FERC's orders concerning the basic issues underlying the breach of contract dispute, deference to FERC authority requires that we reverse the breach of contract verdict. We further hold that CIG failed to establish there was a dangerous probability that Natural would monopolize the long distance transportation market. Therefore, we reverse the antitrust verdict. The claim for tortious interference with contractual relations neither interferes with FERC's authority nor is substantively flawed; thus, the jury's verdict on that claim will stand.

## I. *Introduction*

CIG and Natural are owners of pipelines which transport natural gas. For many years, Natural has purchased gas from CIG and transported that gas to markets in the Midwest and East. In July 1982, CIG and Natural entered into a new contract (the Service Agreement or Agreement) which obliged CIG to deliver and Natural to purchase specified quantities of natural gas. CIG sold two types of gas to Natural. Field gas was sold at a lower rate (F-1 rate) than gas which was delivered from

CIG's main transmission line (H-1 rate). The contract set forth how much gas Natural was required to purchase, both on an annual and on a daily basis. Like previous service agreements between Natural and CIG, the 1982 Service Agreement also contained a minimum bill provision which allowed CIG to bill Natural at a predetermined rate for gas which Natural reserved but did not purchase.

Because CIG's Service Agreement with Natural involved the interstate sale of natural gas, the rates and terms specified in the Agreement required approval by FERC. When, in 1982, CIG sought FERC approval, Natural intervened to protest both the rate increase and its contractual obligation to pay CIG for gas it did not purchase. In response to Natural's intervention, FERC modified the terms of the Service Agreement to reduce the price Natural was required to pay for unpurchased gas.

In July 1983, Natural sharply reduced its gas purchases from CIG. Natural paid CIG what Natural determined to be the FERC modified rate for unpurchased gas. Natural's decrease in purchases forced CIG to stop purchasing gas from some of its suppliers. One of those suppliers, Champlin Petroleum, supplied gas to CIG from the Whitney Canyon gas fields in southern Wyoming. Although Natural claimed that it quit purchasing gas from CIG because it had an oversupply of gas, the evidence made this claim problematical. As soon as CIG ceased purchasing Whitney Canyon gas, Natural made arrangements to purchase that gas directly from Champlin. Indeed, CIG presented evidence that Natural purchased gas from many sources to replace lost volumes from CIG. This substitute gas was often more expensive than CIG's gas. On occasion, Natural resumed purchases of gas from CIG when CIG was attempting to sell gas to new customers. Natural's decision to stop purchasing gas and the losses CIG experienced as a result of that decision form the basis of this litigation.

## II. *CIG's Common Law Claims*

### A. Breach of Contract

The district court instructed the jury that it could find Natural breached the Service Agreement only if Natural failed to purchase gas *and* refused to pay CIG the rate that FERC decided was appropriate for volumes not purchased. Neither party disputes that Natural refused to purchase gas. The parties dispute the rate FERC determined to be appropriate for gas not taken. Natural argues that the district court should have directed a verdict on the breach of contract claim in its favor because it paid CIG the FERC determined rate for gas not purchased. We agree.

In order to apprehend the parties' arguments on this issue, it is necessary to examine the long history of the dispute over Natural's minimum purchase obligation before FERC.[1] For many years the service agreements between CIG and Natural contained two provisions which, together, defined Natural's minimum purchase obligations.[2] Section 2 of the Service Agreement, the "minimum

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[1] The difficulty that CIG and Natural faced with the minimum purchase obligation was not unique. Minimum purchase obligations in gas contracts became a problem for the industry in the early 1980's, as a nationwide gas surplus forced many purchasers to curtail their takes. The huge liability incurred by purchasers forced FERC to take action on two procedural levels. First, FERC considered purchasers' objections to minimum purchase requirements on a case by case basis and modified service agreement provisions where necessary. Second, because minimum purchase obligations were wide-spread in the natural gas industry, FERC issued general orders that modified certain provisions in all gas contracts. Thus, the conflict between CIG and Natural was just a small part of a significant problem which required FERC's continued attention.

[2] For purposes of this opinion we are using the term "minimum purchase obligation" to refer to contract terms which seek to insure that gas buyers purchase a minimum volume of gas. These provisions are sometimes called "take or pay," "minimum bill," or "minimum take" provisions. Although the precise details or mechanisms of these provisions might differ, they have similar effects.

daily take provision," required Natural to accept *each day* 90% of its General Daily entitlement.[3] Section 4 of the Service Agreement, the "minimum annual bill," required Natural to purchase *each year* 90% of its Total Annual Entitlement, or pay CIG a predetermined rate for gas not purchased.[4]

Natural first objected to the minimum purchase obligation in the Service Agreement when CIG sought approval of the rates and terms of the Agreement from FERC in 1982. The reasonableness of the minimum purchase obligation was considered in administrative proceedings before an administrative law judge in 1983. The judge found the "minimum bill provisions" to be unreasonable and ordered CIG to modify the Service Agreement so that CIG could collect from Natural only the fixed costs[5] as-

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[3] Section 2 of the Service Agreement entitled "POINTS OF DELIVERY, MAXIMUM DAILY VOLUME OBLIGATIONS, AND PRESSURES" includes Natural's daily purchase obligation. It states:

> Variations in daily takes may be made at Buyer's election at H-1 delivery points to meet its varying load conditions, however, Buyer shall not request total daily volumes on any day hereunder less than 90 percent of the General Daily Entitlement.

[4] Section 4 entitled "MINIMUM BILL" states, in relevant part:

> The minimum bill shall be . . . determined by multiplying the Total Annual Entitlement by a factor of 90 percent, such volume hereinafter referred to as "Minimum Volume." . . . *In the event the Buyer's actual purchases for the fiscal year are less than the Minimum Volume, then any deficiency shall be billed at the unit fixed cost component under Rate Schedule F-1*. . . .

(Emphasis added.)

[5] Fixed costs are costs which CIG must incur regardless of the volume of gas it sells. The fixed cost component of the commodity charge also includes a sum representing profits on CIG's operations. The major nonfixed (variable) cost, which CIG was forced to eliminate from the rate it could charge Natural, was the cost of gas.

sociated with the sale of gas. This decision was appealed to FERC, which, in response, modified the precise mechanism by which CIG could collect money for unpurchased gas but left unchanged the basic ruling that CIG could collect only fixed costs for unpurchased gas.[6]

In response to FERC's ruling, CIG submitted to FERC a modification of its Service Agreement by which it sought to collect F-1 fixed costs for F-1 gas which Natural did not purchase and H-1 fixed costs for unpurchased H-1 gas. Since the fixed cost component of gas rates included profits on the sale of gas, CIG's submitted rate would have insured full profits on unsold gas. However, FERC did not approve this rate for unpurchased gas.[7] It ruled that CIG could collect only F-1 fixed costs for whichever type of gas Natural did not purchase. CIG appealed FERC's order to this court asserting that it should collect full profits on unsold gas. We rejected this appeal. *Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803 (10th Cir. 1986), *cert. denied*, 479 U.S. 1043, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987).

CIG now argues that these extensive proceedings only considered one aspect of the minimum purchase obligation, namely, the minimum annual bill provision (Section 4) of the Service Agreement. It insists FERC simply overlooked the minimum daily take requirement (Section 2) in the individual proceedings. CIG asserts that the minimum daily take requirement was later modified by FERC's Order No. 380-C which ruled that minimum take provisions were meant to be governed by Order No. 380.

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[6] On the same day, FERC issued Order No. 380 which required gas sellers to modify their minimum bill provisions to collect only fixed costs for unpurchased gas.

[7] FERC explained that allowing CIG to collect only F-1 fixed costs for the more expensive H-1 gas would give CIG a strong incentive to sell H-1 gas instead of merely collecting fees for undelivered gas.

Although FERC's general orders treated minimum bill provisions identically with minimum take provisions, CIG argues that because FERC Order No. 380-C states sellers may collect fixed costs,[8] CIG may collect F-1 fixed costs for unsold F-1 gas and H-1 fixed costs for unsold H-1 gas. If we were to accept CIG's argument, CIG could collect a higher rate for each year that Natural failed to purchase gas by adding up its compensation for Natural's *daily* failure to take gas than it could by using the individually tailored FERC formula for determining CIG's compensation for Natural's *annual* failure to purchase gas. Aside from the irrationality of this result, we think it ignores the fact that FERC has plainly examined both the minimum annual bill and the minimum daily take requirements in the Service Agreement since the original ALJ decision.

As noted earlier, the ALJ stated that he found the minimum bill provisions to be unjust and unreasonable. CIG apparently assumes this reference to the minimum bill provisions meant that the ALJ only considered the minimum annual bill (Section 4) of the contract. Yet, the rest of the opinion makes clear that the ALJ considered both Sections 2 and 4 of the Service Agreement. For instance, in describing the Service Agreement the ALJ stated, "CIG's mode of billing to Natural under the F-1 and H-1 Rate Schedules is explained for the situation when the minimum bill provisions operate because Natural failed to take 90 percent of its *daily* or *annual* volumetric entitlements." *Colorado Interstate Gas Co.*, 25 F.E.R.C. ¶¶ 63,012, 65,015 (Oct. 18, 1983) (emphasis added). The ALJ clearly understood that the Service Agreement provided a single rate of compensation for failure to purchase gas on a *daily or annual* basis and that he was modifying that rate.

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[8] Since Order No. 380-C was a general order, it did not specify the precise value of the fixed cost CIG, or any other sellers, could collect for unsold gas.

This conclusion is confirmed by subsequent FERC orders. In its order of June 1985, FERC surveyed the entire history of CIG's proceedings before the agency on the minimum purchase issue. FERC stated the ALJ found "*both* the minimum annual volume and the minimum daily take requirement in CIG's Service Agreement" to be unreasonable. *Colorado Interstate Gas Co.*, 31 F.E.R.C. ¶ 61,325 (June 19, 1985). FERC further noted that the *individualized proceedings required* CIG to modify both the minimum annual bill and the minimum daily take provisions to eliminate variable costs. *Id.* The only formula for the elimination of variable costs approved in the individualized proceedings required CIG to charge F-1 fixed costs for failure to purchase either F-1 gas or H-1 gas. The inescapable conclusion is that FERC regarded this as the sole remedy for failure to purchase gas under either contractual provision.

Finally, FERC's amicus brief explains its current interpretation of the FERC proceedings on the minimum purchase issue. The amicus brief states:

> [T]he district court erred in holding that the Commission did not deal with the minimum purchase obligations and that therefore CIG may litigate that issue in this case . . . the Commission treated the minimum bill as the remedy for Natural's failure to live up to its minimum purchase obligation . . . therefore, the district court erred in its perception that the minimum bill and take provisions were separate and discrete matters establishing distinct remedies.

In light of the deference we owe to FERC's interpretations of its own orders, *Colorado Interstate Gas*, 791 F.2d at 810; *Distrigas of Massachusetts Corp. v. Boston Gas Co.*, 693 F.2d 1113, 1119 (1st Cir.1982), and the plain meaning of the orders themselves, there is simply no room for CIG's assertion that FERC's individualized proceedings left the minimum daily take provisions (Section 2) of the Service Agreement unaffected.

B. Breach of Duty of Good Faith and Fair Dealing

Natural argues the jury's verdict on bad faith breach of contract must be reversed because FERC's modification of the rate Natural was required to pay CIG for unpurchased gas gave Natural the *unqualified* right to stop purchasing gas, provided it paid CIG the FERC established price for unpurchased gas. Natural insists that by awarding CIG damages for bad faith failure to purchase gas that were greater than FERC's established rate for failure to purchase, the district court allowed state common law to impinge upon FERC's regulatory authority. CIG asserts that Natural's bad faith alters the character of Natural's conduct so that the FERC rate for unpurchased gas does not apply. While we are unwilling to embrace Natural's claim that FERC's orders shield it from all liability for failure to purchase gas, we do agree that Natural is free from liability for failure to purchase gas based upon the implied duty of good faith and fair dealing in the Service Agreement.

The Supreme Court is wary of attempts by parties, dissatisfied with determinations of federal agencies, to neutralize the effect of those determinations through commonlaw actions for damages. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324, 101 S.Ct. 1124, 1133, 67 L.Ed.2d 258 (1981); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n. 6, 101 S.Ct. 2925, 2930 n. 6, 69 L.Ed.2d 856 (1981). These cases are bottomed on the principle that the Supremacy Clause requires state regulation not thwart federal policy. *Kalo Brick & Tile*, 450 U.S. at 326, 101 S.Ct. at 1134. Common-law claims that seek to litigate matters already decided by a federal agency are therefore preempted.

For instance, in *Kalo Brick & Tile*, 450 U.S. at 311, 101 S.Ct. at 1127, a shipper of goods by rail, sought to assert a state, common-law tort action for damages caused by a regulated rail carrier's decision to eliminate service on a rail line. The Supreme Court unanimously held that

because the Interstate Commerce Commission had, in approving the cessation of service in administrative proceedings, ruled on all the issues underlying the shippers state-court suit, the common-law action was preempted. The Court stated: "It is difficult to escape the conclusion that the instant litigation represents little more than an attempt by a disappointed shipper to gain from the Iowa courts the relief it was denied by the commission." *Id.* at 324, 101 S.Ct. at 1133.

Through its common-law claim of breach of the contractual duty of good faith and fair dealing, CIG obtained an award of damages that allowed it to collect H-1 fixed costs for unpurchased H-1 gas. FERC and this court have repeatedly denied CIG's request to modify the minimum purchase obligation of the Service Agreement to allow it to collect this rate for failure to purchase gas. *Colorado Interstate Gas*, 791 F.2d at 808-09. By allowing CIG to press this claim, the district court gave CIG a second chance to which it was not entitled.

Nevertheless, CIG argues that this case is distinguishable from *Kalo Brick & Tile*[9] and is not a collateral attack upon FERC's decision because FERC denied CIG H-1 fixed costs for unpurchased H-1 gas only if Natural decided not to purchase gas in good faith. CIG contends, once Natural decided to "shut in" CIG's gas in order to harm CIG, FERC's remedy for failure to purchase gas, a remedy which did not allow collection of H-1 fixed costs, was no longer intended by FERC to apply. Essentially, CIG is asking us to imply a good faith limitation upon the scope of FERC's remedy for failure to purchase gas.

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[9] The Court in *Kalo Brick & Tile* emphasized that the "commission has actually addressed the matters [the customer] wishes to raise in state court." 450 U.S. at 327, 101 S.Ct. at 1135. The Court reserved the question of whether "a state court suit is barred when the commission is empowered to rule on the underlying issues." *Id.* In this case, FERC was not explicitly confronted with the question of whether Natural's motive for not purchasing gas would be relevant to the rate CIG could collect for that gas.

While we find CIG's argument forceful, we cannot ignore the Supreme Court's vigorous effort to insure agency action is not blunted by state regulation. *See, e.g., Nantahala Power and Light Co. v. Thornburg*, 476, U.S. 953, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986) (state regulated rate for retail sale of gas did not give enough *weight* to FERC determined rate for wholesale gas sales); *Kalo Brick & Tile*, 450 U.S. at 326, 101 S.Ct. at 1134. We think that limiting the scope of the FERC developed remedy for failure to purchase gas in the manner suggested by CIG would permit circumvention of FERC authority through state contract law. In order for FERC's remedy to be effective, it must have room to breathe. As the Supreme Court has stated, "Respondents' theory of the case would give inordinate importance to the role of contracts between buyers and sellers in the federal scheme for regulating the sale of natural gas." *Arkansas Louisiana Gas*, 453 U.S. at 582, 101 S.Ct. ata 2932. We think this statement applies with equal force to this case.

Further, the limited evidence we have suggests FERC intended the collection of F-1 fixed costs to be the exclusive contract remedy for failure to purchase gas. FERC's amicus brief notes the jury awarded damages for antitrust, tort, and breach of contract claims. Nevertheless, FERC *only* sought to have the damages for breach of contract reversed. FERC did not distinguish between the breach of contract damages awarded for bad faith failure to purchase gas and those awarded for failure to purchase gas under Section 2 of the Service Agreement.[10]

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[10] The district court did not ask the jury to award damages separately for breach of Section 2 of the Service Agreement and breach of the contractual obligation of good faith and fair dealing. This is troubling because we cannot determine what damages, if any, the jury intended to award for each breach.

Further, the jury incorrectly found that Natural breached its obligation to purchase gas under Section 2 of the Service Agreement. Having found that Natural deliberately breached the Service Agreement by deciding not to purchase gas, it is difficult to see how

This interpretation of FERC's intent mirrors FERC's interpretation of the scope of its actions in a closely analogous context. During the gas shortage of the early 1970's, FERC permitted sellers of gas to curtail their contractually agreed upon deliveries of gas, if the curtailment was carried out in accordance with plans on file with FERC. *See, e.g., United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 421 (5th Cir.1987). Buyers who did not receive gas they contracted for sued sellers based upon breach of contract and various tort theories. *Id.; see also CF Industries v. Transcontinental Gas Pipe Line*, 614 F.2d 33 (4th Cir.1980). In response, sellers sought to have FERC modify their service agreements to exculpate them from liability for failure to deliver gas to buyers curtailed under curtailment plans. FERC declined to deny the purchasers all remedies for the sellers' failure to deliver gas stating:

> Claims that are essentially "*breach of contract*" in nature and arise because of curtailments initiated and conducted in accordance with effective curtailment tariffs are preempted by federal law, which nullifies them. But claims that require a finding of *negligence* to permit recovery remain unaffected.

*Transcontinental Gas Pipe Line*, 35 F.E.R.C. ¶¶ 61,043, 61,080 (April 7, 1986) (emphasis added).[11]

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the jury could objectively consider the question of whether Natural acted in good faith.

Thus, even if we were to find that the bad faith claim was not preempted, we would have to order a new trial. First, the jury would have to evaluate CIG's bad faith claim in light of the fact that Natural did not breach Section 2 of the Service Agreement. Second, even if the jury still found that Natural breached its contractual obligation of good faith and fair dealing, it would have to determine the appropriate damages for this breach.

[11] Significantly, one seller challenged FERC's decision alleging that if buyers were permitted to sue based upon a seller's negligent or willful misconduct, some state courts might conclude that actions for "breach of a good faith duty" were *not* preempted. *United Gas*

We believe FERC intended to draw the same line for failure to take gas as it drew for failure to purchase. Actions based upon tort were not meant to be preempted by FERC's modification of the contract, while actions based upon breach of contract were. Any other distinction would impermissibly undermine the effectiveness of FERC orders. Thus, the jury's verdict for bad faith breach of contract must be reversed.

C. Tortious Interference with Contract

The gravamen of CIG's tortious interference with contract claim is that Natural intentionally stopped taking gas from CIG in order to force CIG to relinquish its contractual right to purchase Whitney Canyon gas from Champlin Petroleum. CIG alleged Natural was motivated by a desire to acquire the rights to purchase Whitney Canyon gas. After CIG gave up its rights to the Whitney Canyon reserves, Natural did, in fact, acquire the gas.

Natural argues that the jury's verdict, awarding damages for tortious conduct, must be reversed because CIG's claim is preempted by FERC's modification of the minimum purchase provisions. Natural also asserts that because the Service Agreement allowed it to stop purchasing gas, it may not be held liable for tortious interference based on that conduct. We disagree.

FERC's modification of the contract remedy for failure to purchase gas does not limit CIG's right to seek damages for tortious interference with contract. As noted above, in an analogous situation, FERC decided that although it eliminated a gas seller's *contractual* liability

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*Pipe Line*, 824 F.2d at 428. The Fifth Circuit rejected the suggestion that state courts could interpret FERC orders which allowed actions based upon negligence to permit actions for "breach of a good faith duty." Thus, at least one other court has interpreted FERC orders prohibiting suits based upon breach of contract to also forbid suits based upon breach of the contractual obligation of good faith and fair dealing.

for failure to sell gas to curtailed customers, buyers who did not receive contractually agreed upon volumes of gas could maintain suits based upon a seller's *negligent or willful misconduct*. *United Gas Pipe Line*, 824 F.2d at 430. By not contesting tortious interference damages, FERC apparently made the same distinction in this case. Although *Kalo Brick & Tile* requires preemption of tort actions which conflict with agency orders, 450 U.S. at 326-27, 101 S.Ct. at 1134-35, we decline to find preemption where FERC currently perceives no conflict.

More difficult to evaluate is Natural's assertion that its contractual right to choose between purchasing gas or paying CIG for gas not purchased immunized it from a tortious interference claim based upon failure to purchase. There is some support for the proposition that conduct which is otherwise lawful ought not form the basis of a tortious interference claim simply because the alleged tort-feasor is motivated by a desire to interfere with the plaintiff's contractual relations. *See Circo v. Spanish Gardens Food Mfg. Co.*, 643 F.Supp. 51, 56 (W.D.Mo. 1985); Perlman, *Interference with Contract and Other Economic Expectations: A Clash of Tort and Contract Doctrine*, 49 U.Chi.L.Rev. 61, 128 (1982). Advocates of this position are reluctant to impose limitations on conduct which is otherwise permitted in an economy based upon vigorous competition. Perlman, *supra* at 78.

While we are sympathetic to this view and recognize that the law of tortious interference is evolving, *see Restatement (Second) of Torts*, ch. 37, introductory note at 5 (1977), we believe that the better position is that taken by the Restatement and followed by many courts. This line of authority holds that motive can be a determinative factor in converting otherwise lawful behavior into "improper" conduct for which the defendant will be liable. *Restatement (Second) of Torts* § 767 comment d (1977); *Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc.*, 604 P.2d 1090, 1093 (Alaska 1979); *see also* Perlman, *Inter-*

*ference with Contract*, 49 U.Chi.L.Rev. 61, 78 (1982). Indeed, Professor Prosser has described the contours of the tort stating that "no specific conduct is prohibited . . . and liability turns on the purpose for which the defendant acts." W. Prosser, *Law of Torts* § 129, at 979 (5th ed. 1984).

Natural's interest in being free to adjust its purchases of gas is not so strong that it cannot be limited by a requirement not to exercise its discretion for the purpose of interfering with CIG's contractual relationships. *Alyeska Pipeline*, 604 P.2d at 1093 (right to terminate contract at will did not prevent liability for tortious interference based upon termination of that contract). The tortious interference verdict will stand.[12]

## III. *CIG's Antitrust Claim*

CIG claims that in addition to being a violation of the Service Agreement and a means of stealing CIG's customers, Natural's decision to stop purchasing gas was also the cornerstone of an attempt by Natural to monopolize the market for the long distance transportation of natural gas.[13] Since an attempt to monopolize typically involves

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[12] Natural also asserts the award of $8,000,839 in restitutionary damages was inappropriate. It argues that restitutionary damages are unavailable for tortious interference claims under Section 766A of the Restatement. While it cites one case to this effect, *Marcus, Stowell & Beye Gov't Secs., Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227, 231-32 (5th Cir. 1986), the weight of authority holds that restitutionary damages are available for tortious interference with contract. *See Zippertubing Co. v. Teleflex, Inc.*, 757 F.2d 1401, 1411-12 (3d Cir. 1985); *Federal Sugar Ref. Co. v. United States Sugar Equalization Bd.*, 268 F. 575, 582 (D.C.N.Y. 1920); *National Merchandising Corp. v. Leyden*, 370 Mass. 425, 348 N.E.2d 771, 775-76 (1976); D. Dobbs, *Remedies* § 6, at 465 (1973).

[13] Natural also asserted an antitrust counterclaim against CIG. Natural alleged that CIG monopolized or attempted to monopolize the purchase of Wyoming natural gas by intervening and threatening to intervene in FERC proceedings in which CIG's competitors

an attempt by a firm which does not possess monopolistic control over a market to become a monopolist in that market, CIG's claim is unusual because it does not allege that Natural was attempting to gain control of the transportation market for itself. Rather, CIG alleges Natural stopped purchasing gas in order to give CIG's chief competitor, the Trailblazer System,[14] a monopoly in the long distance gas transportation market.

Natural asserts that a party may not be held liable for attempting to give monopoly power to another party which it does not control. This is especially true, it asserts, when the intended beneficiary of the monopolist is not a single entity but three separately operated entities owned in significant part by the alleged victim of the monopolistic scheme.

Nevertheless, Section 2 of the Sherman Act does not explicitly state that a party can only monopolize for itself. We need not decide this thorny issue because even if we assume that it is possible to create a monopoly for the

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proposed building new pipelines leading out of Wyoming. The district court ruled that the *Noerr-Pennington* doctrine barred evidence of CIG's activities before FERC.

The *Noerr-Pennington* doctrine requires that attempts to influence the government, including attempts to influence administrative agencies, be exempt from attack under the Sherman Act. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511-12, 92 S.Ct. 609, 612-13, 30 L.Ed.2d 642 (1972); *Bright v. Moss Ambulance Serv., Inc.*, 824 F.2d 819 (10th Cir. 1987). We agree with the district court that nothing in CIG's activities before FERC so corrupts the judicial or administrative process that those activities amount to a sham and therefore are exempted from the *Noerr-Pennington* doctrine. *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1176-77 & n. 7 (10th Cir. 1982).

[14] It is important to distinguish between NGPL-Trailblazer, one of the defendants, and the Trailblazer System. The Trailblazer System is a series of three separately owned and operated pipelines joined end-to-end which stretches from Wyoming to Nebraska. When built in 1982, the Trailblazer System greatly expanded the capacity of producers to move their gas from Wyoming to eastern

benefit of a third party, CIG did not establish each of the elements of an attempted monopolization claim.[15]

CIG alleges that Natural attempted to monopolize the market by preventing CIG from offering gas transportation services to customers who might choose between CIG and the Trailblazer System. Because CIG was required to maintain capacity in its pipeline for the volume of gas Natural chose to reserve under the Service Agreement, CIG was not able to replace lost income from Natural's reduced purchases by offering "firm" [16] transportation services to new customers. In the summer of 1984, after Natural had stopped taking gas from CIG, CIG offered Natural the opportunity to reduce the capacity it reserved on the CIG system. Instead of reducing its reservation, Natural chose to increase it. Thus, Natural

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markets. The westermost segment of the Trailblazer System, Overthrust, is owned by CIG and Natural, as well as four other companies. The middle segment, WIC, is owned by CIG alone. The easternmost and longest segment of the system, Trailblazer, is owned jointly by NGPL-Trailblazer and two other companies. The Trailblazer System, the alleged beneficiary of Natural's predatory conduct, is not even a party to this case.

[15] The difficulty with punishing a firm for attempting to create a monopoly for a third party which does not act as a single entity, is that the threat to competition after the monopoly is achieved is obscure. In a more typical case in which a firm is attempting through unfair means, to gain control of a market for itself, one can be quite certain the firm will not hesitate to exercise its newly acquired monopoly power. In this case, the alleged monopolist's (Natural's) conduct says little about its *intended beneficiary's* (the Trailblazer System's) proclivity or ability to monopolize. Section 2 of the Sherman Act does not punish the mere possession of monopoly power. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62, 31 S.Ct. 502, 516, 55 L.Ed. 619 (1911).

[16] Gas can be sold on either a firm or interruptible basis. Firm sales guarantee the purchaser that he will receive the volumes of gas he reserves, while interruptible sales only guarantee deliveries if customers with higher priority do not demand the gas. Since CIG had a firm obligation to sell gas to Natural, CIG could only offer to sell interruptible service to new customers.

continued to tie up CIG's capacity, while refusing to purchase gas.

Further, CIG attempted to offer interruptible service to new customers to utilize the capacity left vacant by Natural's decreased purchases. Soon after CIG began to service the new customers, Natural resumed purchases of gas, forcing CIG to interrupt its service to the new customers. Because the Trailblazer System could offer inexpensive, uninterrupted service, CIG's new customers switched to the Trailblazer System.

While Natural's alleged manipulation of its gas purchases in an effort to disrupt CIG's ability to service new customers may be reprehensible conduct, the antitrust laws cannot be invoked to punish all forms of unseemly business activity. If a party does not have monopolistic control over a market, its unfair business conduct implicates the attempt provision of the antitrust laws only if that conduct threatens to create a monopoly. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413 (7th Cir.1989); *cf. Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 54, 97 S.Ct. 2549, 2559, 53 L.Ed.2d 568 (1977) ("an antitrust policy divorced from market considerations would lack any objective benchmarks"). The defendant need face the added sanction of antitrust triple damages only if the plaintiff can establish each element of an antitrust offense.

In this circuit, four elements must be proven to establish an attempt to monopolize under Section 2 of the Sherman Act: (1) relevant market (including geographic market and relevant product market) in which the alleged attempt occurred; (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt. *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies*, 783 F.2d 159, 161 (10th Cir.1986). In addition, any private plaintiff seeking treble damages under Section 4 of the Clayton Act must show antitrust injury. *Bruns-*

*wick Corp v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701, *cert. denied*, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977). While Natural argues that CIG has failed to establish each element of the attempted monopolization claim, CIG's failure to show a dangerous probability of successful monopolization reveals the fundamental difficulty in CIG's claim.[17]

In order to satisfy the dangerous probability of success element of an attempt claim, the plaintiff must show that there was a dangerous probability the defendant would achieve monopoly status as the result of the predatory conduct alleged by the plaintiff. *Shoppin' Bag*, 783 F.2d at 162; *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 271

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[17] Several commentators have noted approvingly that the dangerous probability of success element of the attempt to monopolize offense prevents courts from expanding the Sherman Act into a broad unfair competition statute. For instance, Handler & Steuer state:

> [T]here is ample reason for excluding single-firm behavior from the serious penalties of the antitrust laws when no dangerous probability of monopolization exists. When one firm monopolizes an economically significant market or threatens such a monopoly, competition is immediately and seriously jeopardized. It was largely to combat this peril that section 2 of the Sherman Act was passed, fortified with the formidable deterrent of treble damages and criminal penalties. Short of this situation, however, single firm behavior does not present so significant a threat to competition as to warrant such harsh consequences.

Handler & Steuer, *Attempts to Monopolize and No Fault Monopolization*, 129 U.Pa.L.Rev. 125, 175 (1980) (footnote omitted); *see also* 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 833 (1978) (hereinafter Areeda & Turner); *cf.* Cooper, *Attempts Answer to the Prophylactic Riddle of Section Two*, 72 Mich.L.Rev. 373, 454-55 (1974) (warning against expansion of the attempt provision into an unfair competition statute); *but see* Blecher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market,"* 38 Geo. Wash.L.Rev. 215, 222 (1969); Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 Colum.L.Rev. 1451, 1459-61 (1973).

(7th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982). The likelihood of successful monopolization is typically evaluated by examining the defendant's share of the relevant market. *Shoppin' Bag*, 783 F.2d at 161. Reformulated in the terms of market share, the plaintiff must show that there was a dangerous probability that the defendant's conduct would propel it from a non-monopolistic share of the market to a share that would be large enough to constitute a monopoly for purposes of the monopolization offense.[18] The higher the firm's initial market share, the greater the likelihood that it will eventually gain monopolistic control over the market. *Id.* at 162.

CIG asserts the fact that the Trailblazer System's market share rose from 41% to 53% is sufficient evidence to support the jury's finding that there was a dangerous probability that the Trailblazer System would attain a monopoly. If this were a typical attempted monopolization case in which the defendant was attempting to acquire a monopoly for itself through the use of economic coercion, we would have little difficulty in affirming the jury's finding of dangerous probability. First, a market share at the commencement of the defendant's predatory conduct of 41% would show that the defendant would not have to acquire much additional market share in order to attain monopoly control over the market.

More importantly, however, a 41% market share typically indicates that a firm has substantial economic power in the market, and therefore, has the tools at its disposal to elevate its market share to monopolistic levels. In other words, a high market share indicates that the defendant has the economic capacity to monopolize the market. *Id.*

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[18] While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%. 2 E. Kintner, *Federal Antitrust Law* § 12.6 (1980); Areeda & Turner, ¶ 803.

However, proximity to monopolistic status is not enough; the defendant must also have the ability to propel itself to monopolistic control over the market. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989) (50% market share insufficient to show dangerous probability of successful monopolization); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818 827 (6th Cir.1982) ("the real test is whether [the defendant] possessed sufficient market power to achieve its aims"); *United States v. Empire Gas Corp.*, 537 F.2d 296, 305 (8th Cir.1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977) (50% market share insufficient to show dangerous probability of successful monopolization). While the *Trailblazer System's* substantial market share demonstrates its *proximity* to monopoly status, it does not indicate *Natural's capacity* to raise the Trailblazer System's market share to a monopolistic level.

CIG did not attempt to offer evidence of Natural's share of the transportation market. One might initially imagine that evidence of a firm's market share would be required in order to assess that firm's ability to obtain or confer market power, but this is not necessarily true. In this case, Natural's capacity to create a monopoly for the Trailblazer System cannot be measured by Natural's market share because Natural did not use economic coercion in its attempt to monopolize. Rather, Natural took advantage of its contractual right to stop purchasing gas from CIG to magnify the Trailblazer System's position in the market.[19] In evaluating the probability of successful monopolization "we must consider the firm's capacity to commit the offense, the scope of its objective, and the character of its conduct." *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579, 598 (7th Cir.1971),

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[19] The record does not clearly disclose how much of the Trailblazer System's market share gain reflected increased transportation volumes because CIG was unavailable as a competitor, and how much the market share gain simply resulted from the Trailblazer System's constant sales level in comparison with CIG's sales losses.

*cert. denied*, 405 U.S. 1066, 92 S.Ct. 1500, 31 L.Ed.2d 796 (1972). In this case each of these factors is strictly determined and ultimately limited by the Service Agreement between Natural and CIG.

Natural's predatory conduct consisted of exercising its contract rights with CIG to prevent CIG from offering transportation services to long distance customers. Because Natural reserved a certain amount of space in CIG's pipeline, CIG could not offer that space to others. By continuing to reserve large amounts of gas and taking gas when CIG threatened to sell Natural's reserved capacity, Natural insured that CIG could not offer Natural's reserved capacity to the market. Yet, Natural's ability to exclude CIG was strictly limited by Natural's ability to insure its reserved capacity went empty. By exercising *all* its rights under the Service Agreement to tie up the *entire* capacity it had reserved, Natural was still only able to raise the Trailblazer System's market share to 54%.

Thus, *from the beginning*, Natural's decision to quit purchasing gas presented no danger that Natural could do anything more than shift 13% of the market to the Trailblazer System. The necessarily limited scope of Natural's objective leaves no room for speculation about the probability that the Trailblazer System would gain a monopoly. There was simply no reasonable chance, let alone a dangerous probability, that Natural, through the exercise of its contractual rights, could imbue the Trailblazer System with sufficient market share to be a monopolist.[20]

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[20] We agree with the proposition that it is no defense to an attempted monopolization charge that the defendant's attempt to monopolize proved to be unsuccessful. *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984). Simply because a plan fails to succeed does not mean there was no probability that it could have succeeded. A flipped coin which lands heads still had a 50% chance of landing tails before it was flipped. The capacity

Further, market share statistics sometimes overestimate a firm's market power. *See, e.g., Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir.1986)); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937, 950 (1981). In this case, if we look beyond market share statistics, we are further convinced that Natural's conduct did not threaten to give the Trailblazer System the degree of market power that would constitute a monopoly for purposes of the monopolization offense. One measure of the degree of market power is the persistence of a firm's ability to profitably charge monopoly prices.[21] If the evidence dem-

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of the defendant to monopolize must be evaluated at the commencement of the predatory scheme.

We also note our holding in this case does not require that in every instance where a party intends to eliminate a competitor through unfair means, the elimination of the competitor must give the predator a monopolistic market share. For instance, when a party with a substantial market share eliminates a smaller competitor through economic coercion, increased market power will give it even greater coercive power to eliminate other competitors. There is no reason to wait until the predator attacks a competitor that would put it just over the brink of monopolization before it can be stopped. *See* Note, *Attempt to Monopolize Under The Sherman Act: Defendants Market Power as a Requisite to a Prima Facie Case*, 73 Colum.L.Rev. 1451, 1462-63 (1973).

In this case, Natural sought to take advantage of a unique opportunity its contract afforded to temporarily harm a competitor of an entity in which it had an economic stake. Unlike the ordinary situation in which a firm's market share is crucial to the firm's ability to engage in predatory conduct and every predatory act makes future predation easier, Natural's ability to engage in predatory conduct would not be enhanced by conferring market share upon the Trailblazer System.

[21] Although most courts do not explicitly discuss the persistence of a firm's ability to charge supracompetitive prices as a measure of a firm's market power, courts indirectly consider the potential longevity of supracompetitive pricing whenever they use market share to evaluate the degree of market power. Market share statistics are a useful measure of market power, in large part, because they indicate the relative durability of supracompetitive pricing

onstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolization offense.[22] 3 P. Areeda & D. Turner, *Antitrust Law*,

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capacity. The greater a firm's market share, the longer it will be able to charge monopoly prices because it will take longer for its small competitors to increase their output enough to discipline prices. *See* H. Hovencamp, *Economics and Federal Antitrust Law* § 3.1, at 58 (1985).

The durability of a firm's ability to charge supracompetitive prices also underlies another factor used to evaluate the degree of market power. Barriers to entry are often used by courts to determine whether an alleged monopolist has sufficient market power for purposes of the monopolization offense. 2 E. Kintner, *Federal Antitrust Law* § 12.9 (1980). Barriers to entry are market characteristics which make it difficult or time-consuming for new firms to enter a market. For instance, if market entry requires the construction of large manufacturing plants, *Cargill, Inc. v. Monfort of Colorodo, Inc.*, 479 U.S. 104, 119, 107 S.Ct. 484, 494, 93 L.Ed.2d 427 (1986), or obtaining governmental approval to enter the market, *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 628-29, 94 S.Ct. 2856, 2873-74, 41 L.Ed.2d 978 (1974), the market is said to have high barriers to entry. Often courts refuse to find a sufficient degree of market power for the monopolization offense when they determine that a market has low barriers to entry. *See, e.g., Ball Memorial Hosp.*, 784 F.2d at 1335. While a firm may have the capacity to charge supracompetitive prices in a market with low barriers to entry, that capacity is likely to be temporary.

[22] Some courts and commentators label the degree of market power necessary for the monopolization offense as "monopoly power." *See* L. Sullivan, *Antitrust* § 22, at 75 (1977) ("Monopoly power can be distinguished from a lesser amount of market power only in degree."); *Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc.*, 679 F.2d 516, 529 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1770, 76 L.Ed.2d 344 (1983). One commentator has suggested that in the future courts might more precisely define monopoly power by "focus[ing] on the *permanence* of market power, with mere market power suggesting that supranormal profits will be *quickly eroded* by new entry, and monopoly power suggesting significantly greater insulation from the *long-run* forces of entry." G. Hay, *Single Firm Conduct*, 57 Antitrust L.J. 75, 81 (1988) (emphasis added). While we do not adopt this commentator's nomenclature,

at ¶ 807; *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C.Cir.1987); *Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc.*, 679 F.2d 516, 530 (5th Cir.1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1770, 76 L.Ed.2d 344 (1983); *Metro Mobile CTS, Inc. v. Newvector Communications, Inc.*, 661 F.Supp. 1504, 1523-24 (1987); *cf. Copperweld v. Independence Tube Corp.*, 467 U.S. 752, 767-68, 104 S.Ct. 2731, 2739-40, 81 L.Ed.2d 628 (1984) (antitrust laws are only meant to condemn conduct with long-run anticompetitive effects).[23]

In this case, the Trailblazer System's ability to charge supracompetitive prices could last only as long as Natural had the contractual right to tie up CIG's pipeline capacity. This right was strictly limited by the duration of the Service Agreement.[24] Once Natural's control over

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we do agree with his assertion that market power must be persistent to make a firm a monopolist for purposes of the antitrust laws.

[23] A suggestion that unidentified market forces will eventually correct supracompetitive pricing will not suffice to show that market power will be temporary. Only when an alleged monopolist faces substantial competition from a *known competitor* who will enter the market in a *definite period of time*, ought courts to decline to find sufficient market power to satisfy the requirement for the monopolization offense. *Williamsburg Wax Museum*, 810 F.2d at 252 (defendant did not have monopoly in the wax figure market because a *known competitor* could, within a year, begin to deliver wax figures); *Metro Mobile CTS*, 661 F.Supp. at 1523-24 (defendant did not possess monopoly power for purposes of the monopolization or attempted monopolization offense even though it controlled 100% of the market because a known competitor had both the plans and capacity to enter the market within three years). *Cf.* Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937, 950, n. 28 (1981) (difficulty in identifying potential competitors forces courts to assume that a firm's ability to charge monopoly prices will be persistent).

[24] The Service Agreement was to expire in 1989. Thus, the Trailblazer System would be free from competition for a longer period of time than the defendants in either *Williamsburg Wax Museum* (1 year) or *Metro Mobile CTS* (3 years). Yet, the actual number of years that the Trailblazer System would be free from competition

CIG's capacity ended, the market would return to the status quo [25] since the Trailblazer System would be helpless to compete against the unused and inexpensive capacity of CIG's system.

This analysis, which requires a plaintiff to show that an attempted monopolist's conduct [26] threatened to create substantial and persistent changes in the marketplace, may allow some unfair and potentially harmful methods of competition to go unpunished by the antitrust laws. But the Supreme Court, in a now oft quoted phrase, has stated "the antitrust laws . . . were enacted for 'the protection of competition not competitors.'" *Brunswick Corp.*

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from CIG is not the deciding factor in this case. Rather the certainty that the market will return to the status quo at a predetermined date and the fact and the Trailblazer System has no power to prevent the erosion of its market share, convince us that the market implications of Natural's conduct are not the subject of the antitrust laws.

[25] There is no suggestion in the record that Natural was in danger of driving CIG completely out of the transportation business before the expiration of the Service Agreement. Indeed, considering CIG's financial resources and record profitability during Natural's tie-up, it is unlikely that Natural could have completely excluded CIG. By attacking CIG, Natural could not alter the competitive structure of the industry which is based on a permanent superstructure. *See Cargill v. Monfort*, 479 U.S. at 119, n. 15, 107 S.Ct. at 494, n. 15.

[26] One treatise has stressed that courts ought to take a long-run view when evaluating allegedly anticompetitive conduct. In attempting to distinguish between conduct that should be addressed by the antitrust laws and conduct which should be regulated by tort law, Professors Areeda and Turner state:

> [M]ost important, is our doubt that the torts and other activities considered in this Paragraph would very often seriously impair the competitive opportunities of rivals in any significant or *permanent* way. We must beware of the inclination to condemn a monopolist on the basis of antisocial behavior that could possibly give him an improper advantage in the market. . . . The antitrust court must, therefore, insist on . . . significant and *more-than-temporary* harmful effects on *competition*.

Areeda & Turner, ¶ 737b (emphasis added).

*v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962)), *cert. denied*, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977). The Court has long recognized that the Sherman Act "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt v. Crumboch*, 325 U.S. 821, 826, 65 S.Ct. 1545, 1548, 89 L.Ed. 1954 (1945). We believe the triple damage sanction of the Clayton Act is too harsh a remedy for unfair methods of competition that only threaten to have a transitory impact on the marketplace. Since there was no dangerous probability that Natural would bestow upon the Trailblazer System the degree of market power, either in terms of market share or persistence, necessary for the monopolization offense, the jury's antitrust verdict must be reversed.

## IV. *Conclusion*

In conclusion, we hold that because FERC has already determined the appropriate contractual rate for failure to purchase gas, and Natural has paid CIG that rate, the verdicts for breach of contract and bad faith breach of contract awarding a different rate are reversed. The antitrust verdict is reversed because CIG failed to present sufficient evidence for a jury to find a dangerous probability of successful monopolization. The verdict for tortious interference with contract is affirmed.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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No. C84-0139-B

COLORADO INTERSTATE GAS COMPANY,
*Plaintiffs,*

vs.

NATURAL GAS PIPELINE COMPANY OF AMERICA
and NGPL-TRAILBLAZER, INC.,
*Defendants.*

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NATURAL GAS PIPELINE COMPANY OF AMERICA,
MIDCON VENTURES, INC., and NGPL-TRAILBLAZER, INC.,
*Counterclaim-Plaintiffs,*

vs.

COLORADO INTERSTATE GAS COMPANY,
WYOMING INTERSTATE COMPANY, LTD., and
THE COASTAL CORPORATION,
*Counterclaim-Defendants.*

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### ORDER ON POST-APPEAL MOTIONS

[Filed Mar. 26, 1990]

This matter comes before the Court on plaintiff's motion for an order declaring that the tort judgment is for $23,213,394 plus post-judgment interest, restating the tort judgment as a separate judgment pursuant to Fed. R. Civ. P. 54(b), and permitting execution of the tort judgment, and defendants' motion for judgment and for an order releasing appellate security from escrow. The Court, having considered the motions and pleadings, having heard the arguments of counsel, and being fully advised in the premises, now FINDS and ORDERS as follows:

## Background

This action originated due to a lawsuit brought by plaintiff Colorado Interstate Gas Company (CIG) against defendants Natural Gas Pipeline Company (Natural) and NGPL-Trailblazer, Inc. In 1982, Natural and CIG entered into a contract (Service Agreement) obligating CIG to deliver and requiring Natural to purchase specified quantities of natural gas. Natural later sharply reduced its gas purchases from CIG. This resulted in CIG decreasing its gas purchases from its suppliers. The day after CIG released one of these suppliers, Champlin Petroleum, from its contract to supply gas to CIG, Natural stepped in and negotiated the sale of gas directly from Champlin Petroleum to Natural. Natural still continued to refuse CIG gas shipments, however, oftentimes purchasing substitute gas from more expensive sources, according to CIG. CIG filed suit alleging, amongst other causes of action, attempted monopolization of the long-distance gas transportation market in violation of antitrust laws, breach of the Service Agreement between CIG and Natural, and tortious interference with CIG's business relationship with Champlin.

This case was presented to the jury in which the jury awarded damages of $159,797,156 for breach of contract, $175,001,711 for antitrust violations, and $39,231,072 for tortious interference. The original verdict total was $724,033,361 after trebling the antitrust claim. Under the November 10, 1986, Judgment, this Court entered a judgment in favor of the plaintiff, CIG, for the total verdict amount of $724,033,361, but reduced the verdict by $175,001,711, to $549,031,650, to avoid duplication of awards. The breakdown is as follows:

| | Breach of Contract | Antitrust | Tortious Interference |
|---|---|---|---|
| Lost Profits | $106,580,792 | $106,580,792 | |
| NW Pipeline | 53,216,364 | 53,216,364 | |
| Demand Charges | | 15,204,555 | $15,204,555 |
| Restitution | | | 24,026,517 |
| Subtotal | $159,797,156 | $175,001,711 | $39,231,072 |
| Reduction by Court to avoid duplication | <159,797,156> | | <15,204,555> |
| Subtotal | $ 0 | $175,001,711 | $24,026,517 |
| Trebling | | × 3 | |
| | $ 0 | $525,005,133 | $24,026,517 |
| New Judgment Total | | $549,031,650 | |

While the November 10, 1966, Judgment did not specify which causes of action the duplicate awards would be deducted from, the mathematics of the judgment make it clear. If the duplicate damages had been deducted from the antitrust cause of action column, the new judgment total clearly would have been different due to the effect of trebling.

In its consideration of the parties' post-trial motions, this Court reduced the judgment even further. The Court held Natural responsible for only one-third of the $24,026,517 tortious interference award, and found that $60,388,000 of the total $106,580,792 lost profits damages —awarded under both the breach of contract and antitrust claim—was not awardable as antitrust damages. A remittitur of $16,017,678 on the tortious interference and $181,164,000 ($60,388,000 trebled) on the antitrust award was ordered. The total remittitur was $197,181,678. This Court also reinstated the breach of contract damage award of $60,388,000. New award totals were $60,388,000 for breach of contract, $114,613,711 for antitrust, and $8,008,839 for tortious interference. *Colorado Interstate*

*Gas Co. v. Natural Gas Pipeline Co. of America*, 661 F. Supp. 1448 (D. Wyo. 1987). Plaintiffs accepted the remittitur and after trebling, the damages awarded totaled $412,237,972. *See* Order Following Remittitur Filed, C84-0139-B (D. Wyo. June 9, 1987).

Natural appealed this Court's decision to the Tenth Circuit Court of Appeals. The Tenth Circuit, on September 11, 1989, reversed the breach of contract and antitrust verdicts, and affirmed the tortious interference verdict. *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 883 F.2d 683 (10th Cir. 1989). Its December 20, 1989, mandate with respect to the tortious interference judgment has not been stayed. Plaintiff CIG filed a motion on January 4, 1990, requesting this Court issue an order declaring the tortious interference judgment to be $23,213,394 plus post-judgment interest, restate the tort judgment as a separate judgment pursuant to Fed. R. Civ. P. 54(b), and permit execution of the judgment. Defendants objected and on February 16, 1990, filed their own motion that CIG take nothing on the judgment and for an order releasing defendants' security from escrow. The Court will consider the defendants' motion first.

*Defendants' Motion for Judgment and for an Order Releasing Appellate Security from Escrow*

The tortious interference cause of action was predicated on the *Restatement (Second) of Torts* § 766A and involved the actions taken by Natural that forced CIG to release Champlin Petroleum from its obligation to supply CIG with gas and resulted in Natural immediately acquiring the rights CIG gave up. *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 661 F. Supp. 1448, 1469 (D. Wyo. 1987). The language in this opinion clearly implied that this Court applied Wyoming substantive law to the tortious interference claim. At that time, this Court believed "Wyoming would recognize a cause of

action under § 766A." *Id.* This prediction proved wrong. Recently, the Wyoming Supreme Court in *Price v. Sorrell*, 784 P.2d 614, 615-16 (Wyo. 1989), refused to adopt § 766A. Defendants argue that since the Wyoming Supreme Court refused to adopt § 766A, CIG's tort claim must now fail because Federal courts are obliged to apply the most recent and controlling state court decisions on state substantive law. Judgment, therefore, should be entered in favor of defendants on the tort claim.

Natural's reading of the *Price* opinion is accurate. However, this Court disputes Natural's contention that Wyoming substantive law applies. This Court never carefully considered whether Wyoming or Colorado law applied in this instance since, at that time, neither Colorado nor Wyoming courts had addressed the adoption or rejection of § 766A. So, by default, this Court applied what it presumed Wyoming law would be.[1] The situation has changed, however, with Wyoming rejecting § 766A in *Price* and Colorado adopting § 766A in *Westfield Development Co. v. Rifle Investment Associates*, No. 88SC628, slip op. at 11 (Colo. Feb. 12, 1990) (en banc). The Court believes it must now make a clear determination on which substantive law to apply.

Wyoming's choice of law principles mandate applying the rules of *lex loci delicti* to determine the applicable state law in tort cases. *Duke v. Housen*, 589 P.2d 334, 342 (Wyo.), *cert. denied*, 444 U.S. 863 (1979). Under *lex loci*, the substantive law of the state where the harm or injury to the plaintiff occurs is the law to be applied, even if the defendants' acts occur in a different state. *Richards v. United States*, 369 U.S. 1, 9-12 & n.24

[1] The Tenth Circuit's opinion also never makes a determination as to whether Wyoming or Colorado law applies. The court simply states that it believes that the position taken by the *Restatement (Second) of Torts* is valid and well supported by the weight of authority. The court determined that CIG has a cause of action under it. *Colorado Interstate Gas Co.*, 885 F.2d at 691 & n.12.

(1962); *see also Bodrug v. United States*, 832 F.2d 136, 137 (10th Cir. 1987) (dictum); *Sack v. Low*, 479 F.2d 360, 366 (2d Cir. 1973); *Lachman v. Bank of La. in New Orleans*, 510 F. Supp. 753, 760-61 & n.2 (N.D. Ohio 1981).

Determining where the injury occurs in a multi-state tort is difficult. Natural argues that the *Restatement of Conflicts* § 377 (1934), *cited in Duke*, 589 P.2d at 341, should be adopted here.[2] Taking this position, Natural contends that the taking of the Champlin gas was the last event giving rise to CIG's § 766A tort claim. Since the actual taking of the gas occurred in Wyoming, Wyoming is the location of the tort and Wyoming law should apply.

CIG contends that the place of injury is where the plaintiff suffers harm, not necessarily where the last act occurs. CIG argues it suffered harm at its place of business, Colorado Springs, Colorado and, therefore, Colorado, not Wyoming, law should apply.

Assuming Natural's position is correct, it is this Court's position that the last element of a tort cause of action is damages. *Sack*, 479 F.2d at 365; *Lachman*, 510 F.Supp. at 760 n.2. In a physical injury tort claim, damages generally are incurred in the state where the plaintiff is physically injured by the defendant. In this instance, the injuries inflicted were financial. Defendants tortiously interfered with CIG's ability to conduct its business. "The 'last event necessary' in this tort is the constriction of plaintiff's opportunities, and that occurs where the plaintiff experiences it, i.e., his place of residence." *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859, 872-

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[2] Section 377 of the *Restatement of Conflicts* (1934) states: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." Wyoming adopted this definition stating that "the law of the place where the plaintiff sustains injury to her person controls." *Duke*, 589 P.2d at 341.

73 (M.D. Tenn. 1980). *See also Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 19 (1st Cir. 1979). Moreover, even if one were to look at the actions taken by the parties, the last event necessary for liability to be imposed upon Natural, was Natural's agreement to purchase gas from Champlin Petroleum, the same gas Natural forced CIG to give up. This agreement took place in Colorado, not Wyoming.

Under this analysis, the Court now finds that Colorado substantive law applies to CIG's tortious interference with a contract claim. Colorado, as contrasted with Wyoming, recognizes § 766A causes of action. Accordingly, CIG's tort claim is still valid. Defendants' motion is hereby denied.

*Plaintiff's Motion for an Order Declaring the Tort Judgment for $23,213,394 and Permitting Execution of the Judgment*

Plaintiff CIG requests that this Court enter an order declaring the tortious interference judgment is for $23,213, 394 plus post-judgment interest dating from November 10, 1986, restating this tort judgment in a separate judgment pursuant to Fed. R. Civ. P. 54(b), and permitting execution of the tort judgment against defendants' escrowed security. The $23,213,394 plaintiff seeks comprises $8,008 839 for restitution and $15,204,555 for demand charge damages.

The original jury verdict for tortious interference damages was $39,231,072. Judgment was entered for this amount on November 10, 1986, by this Court. This included $24,026,517 for restitution and $15,204,555 for demand charges. As noted previously in the background discussion, the $15,204.555 was deducted from the tortious interference award to avoid duplication since the jury also awarded the same amount under antitrust damages. In the Court's Order on Post-Trial Motions dated May 29, 1987, the $24,026,517 restitution award was re-

duced by two-thirds to $8,008,839, and a remittitur ordered for $16 017,678, which plaintiff later accepted. *Colorado Interstate Gas Co. v. Natural Pipeline Co. of America*, 661 F. Supp. 1448, 1480 (D. Wyo. 1987).

Natural contends that CIG is only entitled to $8,008,-839, the amount of the tortious interference award remaining after the reduction for duplication and the remittitur. Natural argues that the $15,204,555 demand charges damages were eliminated from the tortious interference award at CIG's request and cannot now be reinstated. Natural maintains that the Tenth Circuit's affirmance of the tort claim was for the $8.008,839 only. Furthermore, awarding demand charges as tort damages is preempted by FERC decisions according to Natural. As a final argument, Natural asserts that reinstatement of the demand charges would be inequitable.

The Court's Novemebr 10, 1986, Judgment made it clear that the tortious interference award included damages for restitution and for demand charges. It was only for the purpose of avoiding duplication of damages that the demand charges were deducted from the tortious intereference award. The Court never indicated that the tortious interference award was being "permanently" reduced.

This position is supported by the Court's statements and actions during and after the trial. In a conference with counsel to discuss a question presented by the jury regarding the award of duplicate damages, the Court indicated that it pulled the jury instruction on no duplicate recovery "so that in the event any one count failed there could be a complete answer by the jury on the other counts, . . . thereby prevent[ing] the retrial of the case." Record at 8851.

The Court took this very action with regard to future lost profits. In its Order on Post-Trial Motions, the Court determined that $60,388,000 of lost profits were not recoverable as antitrust damages. *Colorado Interstate Gas,*

661 F. Supp. at 1479-80. The $60,388,000 was originally deducted from the breach of contract award to avoid duplicative awards in the Court's November 10, 1986, Judgment. When the Court reduced the antitrust award by the $60,388,000 for lost profits, it reinstated the amount as a breach of contract award. There was no dispute that the $60,388,000 was recoverable under the breach of contract claim. *Id.* at 1480.

The Court sees no reason to treat the reinstatement of the $15,204 555 in demand charges any differently. The jury awarded damages to CIG for demand charges under two different causes of action, antitrust and tortious interference. CIG could only recover under one. Just because one of the causes of action fails does not mean the plaintiff is not entitled to recover under the remaining cause of action.

Natural argues that FERC decisions preempt awarding of tortious interference damages. The Tenth Circuit considered this argument and ruled otherwise. *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 885 F.2d 683, 690-91 (10th Cir. 1989). Furthermore, there is no language in the Tenth Circuit's opinion limiting the tortious interference award to restitution only. *Id.* This Court has also continuously held that demand charges were recoverable under a tortious interference claim. *Colorado Interstate Gas Co.*, 661 F. Supp. at 1469-71, 1478-79.

Natural finally contends reinstatement of the $15,204,555 verdict would be inequitable. The basis for this verdict was CIG's contention that it could not use its rights to the Canyon Creek and Overthrust facilities without the Champlin Petroleum gas. Natural alleges that CIG proceeded immediately after trial to put these rights to valuable use. This use has continued, Natural contends, for the last 2 1/2 years. Natural argues that the revenues from these rights should offset any demand charge damages claimed by CIG.

To support its position, Natural points to the affidavit of CIG's Assistant Vice President, Steven Zuckweiler, provided by CIG. Mr. Zuckweiler stated that "CIG has shipped gas through the facilities of Canyon Creek Compression Company and Overthrust Pipeline Company, from the trial of this case in the fall of 1986 to the present." Affidavit of Steven Zuckweiler at 1, January 24, 1990 (CIG's Memorandum in Opposition to the Motion of Defendants Natural and NGPL-Trailblazer for entry of $8,008,839 Final Judgment, Exhibit D.)

Natural fails to point out, however, that the same affidavit also states that the gas shipped through the pipeline is not CIG's, but belongs to a third-party. The third-party merely compensates CIG for CIG's right to use the pipeline. The revenues received by CIG as a result of this shipping is small. Under the third-party shipping agreements, Mr. Zuckweiler states: "CIG does not realize a net contribution towards its demand charge obligations [from these gas shipments] . . . . [T]he revenue CIG has received for third-party transportation over Canyon Creek and Overthrust do not reduce the damage charge damages CIG has sustained." *Id.* at 2-3 (emphasis deleted). The evidence does not support Natural's contention of inequality. Accordingly, CIG's motion is granted and judgment is entered for the full tort claim amount of $23,213,394.

Natural argues that post-judgment interest of 5.75% compounded annually, dating from the entry of judgment, November 10, 1986, should be paid only on the $8,008,839. Interest on the $15,204,555, if the Court should reinstate that award, should begin as of the date of this judgment.

The November 10, 1986, Judgment entered by this Court included the $15,204,555 as part of the tortious interference award. It was only to avoid duplicative damages on two different causes of action that this Court reduced the jury's verdict, decreasing the tortious inter-

ference award to the amount of restitution awarded.[3] The judgment entered for tortious interference damages included both the $8,008,839 restitution and the $15,204,555 demand charge damages. Interest, therefore, began accruing on both as of that date. Accordingly, pursuant to prior order of this Court and 28 U.S.C. Sec. 1961, CIG is entitled to post-judgment interest at the rate of 5.75%, compounded annually, from November 10, 1986, until the date of this Order and accompanying Judgment.

The interest earned, compounded annually, on the judgment is as follows:

| | |
|---|---|
| Tortious Interference Award | $23,213,394 |
| Interest earned 11/10/86-11/10/87 | 1,334,770 |
| Subtotal | $24,548,164 |
| Interest earned 11/10/87-11/10/88 | 1,411,519 |
| Subtotal | $25,959,683 |
| Interest earned 11/10/88-11/10/89 | 1,492,682 |
| Total | $27,452,365 |
| Per diem interest earned from 11/10/89-11/10/90 | $4,324.69 |

There is no just reason for delay in entering a separate and new final judgment pursuant to Fed. R. Civ. P. 54(b) on CIG's tortious interference claim or for delay in execution of that judgment. This Court will enter judgment in accordance with the Judgment of the United States Court of Appeals for the Tenth Circuit and this Order.

ACCORDINGLY, IT IS

ORDERED, ADJUDGED, and DECREED that judgment be entered in favor of plaintiff Colorado Interstate

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[3] The restitution originally awarded was $24,026,517. This was later reduced via a remittitur to $8,008,839, one-third the original amount. *Colorado Interstate Gas*, 661 F.2d at 1479.

Gas Company on its claim for tortious interference with a contract in the aggregate amount of $28,040,523, representing $23,213,394 in damages and $4,827,129 in post-judgment interest dating from November 10, 1986 to the date of this Order, together with post-judgment interest of 8.36% on the new aggregate amount as provided by law from and after the date of this new Judgment and Order hereof. It is further

ORDERED that any stay of execution previously entered by this Court in this matter is vacated to permit execution of the judgment contained herein. It is further

ORDERED that pursuant to the Escrow Agreement approved by this Court on August 3, 1987, Wyoming National Bank, Cheyenne, N.A., (formerly Norwest Bank Cheyenne, N.A.) shall distribute cash or cash equivalents in the form of certificates of deposit with total value equal to the amount of judgment. It is further

ORDERED that after Wyoming National Bank, Cheyenne, N.A., has complied with the order of the previous paragraph, Wyoming National, Bank, Cheyenne, N.A., shall distribute the balance of the certificates of deposit held by it as Escrow Agent to defendant Natural Gas Pipeline Company of America.

Dated this 26th day of March, 1990.

/s/ Thomas C. Brimmer
Chief Judge
United States District Court

## APPENDIX D

UNITED STATES DISTRICT COURT
D. WYOMING

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No. C84-139-B

COLORADO INTERSTATE GAS COMPANY,
*Plaintiff,*

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA and NGPL-TRAILBLAZER, INC.,
*Defendants.*

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NATURAL GAS PIPELINE COMPANY OF AMERICA, MIDCON VENTURES, INC., and NGPL-TRAILBLAZER, INC.,
*Counterclaim-Plaintiffs,*

v.

COLORADO INTERSTATE GAS COMPANY, WYOMING INTERSTATE COMPANY, LTD., and the COASTAL CORPORATION,
*Counterclaim-Defendants.*

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May 29, 1987

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ORDER ON POST-TRIAL MOTIONS

BRIMMER, Chief Judge.

This matter came before the Court on defendants' motion, pursuant to Fed.R.Civ.P. 50(b) and 59, for judg-

ment notwithstanding the verdict, for new trial, or for a remittitur. The Court, having heard the arguments of counsel, having reviewed the pleadings, and being fully advised in the premises, FINDS and ORDERS as follows:

Plaintiff Colorado Interstate Gas Company (CIG) and defendants, Natural Gas Pipeline Company of America and NGPL-Trailblazer, Inc. (hereinafter collectively refered to as "NGPL"), compete to transport natural gas. In July 1982, NGPL and CIG entered a contract (the Service Agreement) obligating CIG to deliver and requiring NGPL to purchase specified quantities of natural gas. The Service Agreement requires CIG to maintain sufficient gas reserves and pipeline transportation capacity to ensure delivery of NGPL's entitlements. Section 2 of the Service Agreement commits NGPL to purchase a minimum daily volume of gas or to pay the fixed costs of the volumes not taken.

In 1981-1982 a new pipeline, the Trailblazer System, was constructed to transport natural gas out of the Overthrust region of Wyoming. Three pipeline, segments form the Trailblazer System: the Overthrust Pipeline, the Wyoming Interstate Company or WIC Pipeline, and the Trailblazer Pipeline. NGPL-Trailblazer owns the Trailblazer Pipeline in partnership with two other companies. NGPL-Trailblazer is the operator. Trailblazer competes with CIG to transport natural gas from the Overthrust.

In July 1983, NGPL refused to accept gas from CIG. The Natural Gas Act nevertheless obligated CIG to be ready to deliver any volumes requested by NGPL. CIG could not use the pipeline capacity reserved for NGPL to ship natural gas for other customers.

CIG was consequently unable to purchase gas from its own suppliers, so it shut-in gas owned by Champlin Petroleum in the Whitney Canyon area of Wyoming. Champlin and CIG began renegotiating their contract. Champlin insisted that CIG release its rights to purchase Whitney Canyon gas. CIG acceded. The next day, NGPL

bought Champlin's Whitney Canyon gas, although NGPL still refused deliveries from CIG. NGPL shipped the Whitney Canyon gas through the Trailblazer Pipeline. In addition to acquiring Champlin's Whitney Canyon reserves, NGPL purchased gas from new suppliers and increased its takes from existing gas suppliers.

CIG brought this action alleging that NGPL attempted to monopolize the market for the long-distance transportation of Wyoming natural gas, that NGPL conspired to monopolize that market, that NGPL breached the Service Agreement and its duty of good faith and fair dealing, and that NGPL tortiously interfered with CIG's business relationship with Champlin. NGPL asserted counterclaims alleging that CIG's parent, the Coastal Corporation (together with CIG and WIC), monopolized, attempted to monopolize and conspired to monopolize the purchase, transportation and sale of natural gas in the Overthrust area. NGPL also alleged that Coastal acquired and attempted to acquire competitors in violation of §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act.

At trial CIG abandoned its antitrust conspiracy claim against NGPL. The Court directed a verdict for CIG on NGPL's conspiracy counterclaim. A directed verdict was also rendered against NGPL on its claims that CIG monopolized and attempted to monopolize the sale of natural gas and that Coastal unlawfully acquired competitors. After an eight week trial, the jury retired to consider:

> 1. whether NGPL breached the Service Agreement, tortiously interfered with CIG's business or contractual relationships, and attempted to monopolize the long-distance transportation of Wyoming gas; and
>
> 2. whether Coastal, CIG and WIC monopolized and attempted to monopolize the purchase and transportation of natural gas.

The jury rejected NGPL's counterclaims and found in favor of CIG on each cause of action. CIG was awarded

$159,797,156 on its breach of contract claim, $175,001,711 on its antitrust claim and $39,231,072 on its tortious interference claim. The total award reached $724,033,361 after trebling the antitrust damages. The Court, however, determined that the damages were duplicative and reduced the judgment to $549,031,650 by deleting the damage award for breach of contract. NGPL now seeks judgment notwithstanding the verdict on each of CIG's successful claims. In the alternative NGPL moves for a new trial or for a remittitur.

Substantial evidence supports the jury's verdict, and NGPL's motions for judgment notwithstanding the verdict or new trial are denied. The Court concludes, however, that the jury erroneously awarded CIG $16,017,678 as damages for tortious interference with contract, and the Court will grant a remittitur in this amount. The jury also awarded CIG its future F-1 lost profits as antitrust damages. The total amount of future lost profits was $60,388,000, which was trebled to $181,164,000. The jury erred in awarding CIG its future F-1 lost profits as antitrust damages but correctly included them as damages for breach of contract. Therefore, the Court will grant a remittitur in the amount of $181,164,000 but reinstate the breach of contract damage award in the amount of $60,388,000. The total amount of the remittitur is $197,181,678.

## I. JUDGMENT NOTWITHSTANDING THE VERDICT

Caution must be exercised in granting judgment notwithstanding the verdict because it deprives the prevailing party of the jury's factual determination. *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 680 (10th Cir.1981). Granting the motion is appropriate only when the evidence points one way and no reasonable inferences support the position of the opposing party. *Equal Employment Opportunity Comm'n v. Prudential Fed. Sav. and*

*Loan Ass'n*, 763 F.2d 1166, 1171 (10th Cir. 1985) (citing *Symons v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1974)), *cert. denied*, —— U.S. ——, 106 S.Ct. 312, 88 L.Ed.2d 289 (1985). The evidence and accompanying inferences must be viewed in a light most favorable to the prevailing party. The court may not weigh the evidence, consider the credibility of witnesses or substitute its judgment for the jury's. *Joyce v. Atlantic Richfield Co.*, 651 F.2d at 680 n. 2. The proof favoring the movant must be so overwhelming that judgment notwithstanding the verdict is the only option available to the court. *Acree v. Minolta Corp.*, 748 F.2d 1382, 1387 (10th Cir.1984). If fairminded people may differ as to the conclusions or if there is substantial conflicting evidence, judgment notwithstanding the verdict must be denied. *Ryder v. City of Topeka*, 814 F.2d 1412, 1418 (10th Cir.1987) (citing *Wylie v. Ford Motor Co.*, 502 F.2d 1292 (10th Cir.1974)).

The jury's determination must nevertheless be supported by substantial evidence. *White v. Conoco, Inc.*, 710 F.2d 1442, 1443 (10th Cir.1983). Substantial evidence is relevant evidence found in the record as a whole which reasonable minds might accept as adequate to support the conclusion. *Allstate Ins. Co. v. Hiseley*, 465 F.2d 1243, 1247 (10th Cir.1972). The court must determine whether a rational jury could conclude that each required element of the claim was met. *Downie v. Abex Corp.*, 741 F.2d 1235, 1238 (10th Cir.1984). The jury's findings on sharply conflicting evidence, however, are conclusively binding, for the jury is charged with the exclusive duty of assessing the credibility of witnesses and determining the weight to be given their testimony. *Ryder v. City of Topeka*, At 1420-21 (quoting *White v. Conoco, Inc.*, 710 F.2d 1442 (10th Cir.1983)).

A. Attempt to Monopolize

An attempt to monopolize requires proof of four elements: (1) a relevant market; (2) a dangerous probabil-

ity of success; (3) specific intent to monopolize; and (4) conduct in furtherance of the attempt. *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc.*, 783 F.2d 159, 161 (10th Cir.1986). Private plaintiffs must also show antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). NGPL urges that the evidence was insufficient to permit a reasonable jury to conclude that CIG established the essential elements of an attempt to monopolize. BRIEF OF NATURAL GAS PIPELINE COMPANY OF AMERICA IN SUPPORT OF MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL AND OR REMITTITUR at 9 (hereinafter cited as "NGPL Brief").

1. Antitrust Injury

Private plaintiffs must prove antitrust injury to recover treble damages. *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. CIG failed to prove antitrust injury, NGPL contends, because CIG's injury does not flow from diminished competition in the market for the transportation of natural gas and because the damages awarded by the jury do not reflect any anticompetitive effect of the violation. NGPL characterizes CIG's claim of antitrust injury as one for lost profits under the Service Agreement, a loss for which the antitrust laws do not afford relief. Even if such losses were cognizable, NGPL argues CIG failed to connect its lost profits to its antitrust claim.

CIG claims that NGPL's conduct injured competition. The shut-in, tie-up and manipulation of takes was designed to establish control of the market and to achieve monopoly. Competition was injured, CIG argues, because the marketplace was deprived of a low-cost transportation alternative. The shut-in precluded CIG from competing with the Trailblazer System to transport NGPL's gas and prevented CIG from providing noninterruptible transportation services to other pipelines. Consumers and pro-

ducers, CIG concludes, thus had to pay higher prices to transport Wyoming gas.

The United States Supreme Court defines antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation. *Id.* It should be the type of loss that the claimed violation would be likely to cause. *Id.* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125, 89 S.Ct. 1562, 1577, 23 L.Ed.2d 129 (1969)).

The antitrust injury test is ambiguous. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U.Chi.L.Rev. 467 (1980). Two recent United States Supreme Court cases help to clarify the concept of antitrust injury.

Plaintiff in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982), was a health insurance subscriber whose benefits included reimbursement for psychiatrists' fees but not psychologists' fees. Plaintiff alleged that Blue Shield conspired with psychiatrists to drive psychologists from the health care market. The district court dismissed the case, holding that plaintiff lacked standing because she was not a competitor in the health care market. The court of appeals reversed. It held that treble damages are available to any person whose injury is directly or proximately caused by a violation of the antitrust laws. *Id.* at 468-72, 102 S.Ct. at 2542-44.

On appeal the Supreme Court addressed the doctrines of standing and antitrust injury. With regard to the latter, the Court embraced the view that recovery of treble damages should be linked to the procompetitive policy of the antitrust laws. *Id.* at 482, 102 S.Ct. at 2550. At the same

time, it rejected the claim that *Brunswick* limits recovery to those plaintiffs who show that their injuries reflect the anticompetitive effect of the violation. *Id.* The Court held that plaintiffs demonstrate antitrust injury where their injuries are "inextricably intertwined with the injury the conspirators sought to inflict . . . the market." *Id.* at 483-84, 102 S.Ct. at 2550-51. The Court also said that a plaintiff need not prove an actual lessening of competition or that it was driven from the market. *Id.* at 482, 102 S.Ct. at 2550 (quoting *Brunswick*, 429 U.S. at 490 n. 14, 97 S.Ct. at 698). Two facts distinguished *McCready* from *Brunswick*. First, plaintiff alleged a purposeful anticompetitive scheme. Second, plaintiff did not label increased competition as a harm to her. *Blue Shield of Virginia v. McCready*, 457 U.S. at 483 & n. 19, 102 S.Ct. at 2550 and n. 19. The Court finally noted that "the relationship between the claimed injury and that which is unlawful in the defendant's conduct, as analyzed in *Brunswick*, is *one factor* to be considered in determining the redressability of a particular form of injury under § 4." *Id.* at 483 n. 19, 102 S.Ct. at 2550 n. 19 (emphasis added).

The additional factors to be considered became clear in *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). In that case, a carpenters' union sued an association of general contractors, alleging that the association influenced its members and third parties to withhold their business from unionized firms in order to restrain the union's business activities. *Id.* at 521-23, 103 S.Ct. at 899-900. The question presented was whether the union could recover for injuries resulting from the association's coercion of third parties. *Id.* at 535, 103 S.Ct. at 907. The Court held that the union lacked standing to seek treble damage. *Id.* at 545-46, 103 S.Ct. at 912.

The Court evaluated plaintiff's harm, the alleged wrongdoing and the relationship between them. *Id.* at 535, 103

S.Ct. at 907. Several factors were examined: the causal connection between the violation and the injury, defendant's intent to cause the harm, whether Congress intended to redress the injury, the existence of a class of persons more directly injured by the violation, the directness of the causation between the violation and the injury, the address to which the claim was speculative, the availability of other more appropriate remedies, and the judicial interest in managing complex litigation and avoiding double recovery. *Id.* at 537-44, 103 S.Ct. at 908-11.[1]

*McCready* and *Associated General Contractors* thus suggest that many factors must be considered in a proper analysis of antitrust injury. In this case, CIG alleged that NGPL attempted to monopolize the long-distance transportation of natural gas by excluding CIG from the market. Three issues are raised: whether a reasonable jury could conclude that CIG was excluded from the market, whether the alleged injury is redressable under the antitrust laws, and whether a reasonable jury could conclude that the violation and the injury were connected.

The Court must view the evidence as a whole and follow the admonition that an antitrust plaintiff "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Aspen Highlands-Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522 n. 18 (10th Cir.1984) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962)), *aff'd*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985).

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[1] While *Associated General Contractors* is a standing case, it aids in analyzing CIG's claims. The concepts of standing and antitrust injury are similar, and many courts have incorporated *Brunswick* into their standing tests. *See, e.g., John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977). Justice Marshall, the author of *Brunswick*, described that opinion as one denying standing. *Associated General Contractors*, 459 U.S. at 549 (Marshall, J., dissenting).

Viewed as a whole and in a light most favorable to CIG, ample evidence supports the jury's determination that CIG was excluded from the market. CIG's theory of attempted monopolization is built on several related acts. The first step was the shut-in of CIG gas at the H-1 delivery point. This closed off the southern outlet for Wyoming gas. CIG, to cut back its own supplies, reduced takes from Northwest Pipeline, which was buying substantial amounts of natural gas in Wyoming and transporting it to the south and east through CIG's system. Northwest Pipeline sent the gas to the Seattle market to avoid transporting it through the Trailblazer System at a higher cost or breaching its contracts with its own suppliers. This in turn saturated the Seattle market, where Canadian natural gas was plentiful. The shut-in thus closed off the outlet for Wyoming gas in the Northwest. Because the Northwest Central and Kansas-Nebraska pipelines stop short of the Overthrust, closing the northwest and southeast outlets left one transportation alternative for Wyoming natural gas: the Trailblazer System. Tr. at 1550-55; 1693-94. CIG had difficulty obtaining new business, because the Service Agreement compelled CIG to stand ready to deliver if NGPL resumed takes. When CIG found new customers, the ANR and Tennessee pipeline companies, NGPL resumed takes, forcing CIG to interrupt its service and to lose its new customers. The NGPL again suspended its takes. Tr. at 1511-20. Although NGPL vigorously disputed this theory at trial, the jury could have concluded that CIG was excluded from the market for the long-distance transportation of Wyoming natural gas.

An attempted monopolization need not cause actual market damage, but must simply threaten to produce the type of market damage contemplated by the antitrust laws. *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 994 (5th Cir.1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 270 (7th Cir.1981), *cert. denied*,

455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982). The jury could have concluded that competition actually diminished. Evidence was presented showing that, following the shut-in, NGPL's market share for the long-distance transportation of Wyoming natural gas rose from approximately forty-two percent to fifty-five percent, while CIG's share dropped from twenty-three percent to thirteen percent. Tr. at 1505-09; Plaintiff's Exhibit 1758.

The next question is whether lost profits caused by exclusion from the market is an injury which the antitrust laws are intended to prevent. *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. Congress intended to preserve competition by enacting the antitrust laws. *Id.* at 488, 97 S.Ct. at 697. Preserving competition in turn promotes maximum consumer economic welfare through efficient use and allocation of scarce resources. I P. Areeda & D. Turner, *Antitrust Law* ¶ 103, at 7 (1978). Antitrust injury narrows the standard for recoverable damages to those actually flowing from antitrust violations that cause market inefficiency. Page, *supra*, 47 U.Chi.L.Rev. at 471. Firms may exclude competitors and yet increase efficiency. The mere fact that a firm has been foreclosed from selling does not, in an economic sense, necessarily mean that it suffered antitrust injury. *Id.* at 484, 97 S.Ct. at 695. One principle *Brunswick* may support is that reductions in profit attributable to conduct preserving allocative efficiency or increasing productive efficiency cannot be recovered as damages. *Id.* at 485, 97 S.Ct. at 695.

Evidence was presented in this case that the Trailblazer System's transportation costs substantially exceeded those of the CIG system. Tr. at 1569-78. The evidence thus supports an inference that a lower-priced competitor was excluded in favor of a higher-priced competitor without a corresponding increase in allocative or productive efficiency. The jury could thus conclude that NGPL's conduct was anticompetitive and redressable under the antitrust laws.

CIG's injury flows from that which makes the defendant's acts unlawful and reflects the anticompetitive effects of the violation. *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. Competition was injured by the exclusion of a low-cost competitor from the market. CIG's exclusion resulted in higher prices to producers, shippers and consumers of natural gas. An increase in price resulting from dampened competitive market forces is redressable under § 4. *Blue Shield of Virginia v. McCready*, 457 U.S. at 482-83, 102 S.Ct. at 2550. CIG also experienced lost profits. Increased prices and lost profits are likely to be caused by the exclusion of a lower-priced competitor. CIG thus proved the type of loss that the claimed violation would be likely to produce. *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697.

The third issue is whether the jury reasonably could have concluded that CIG's injury flowed from NGPL's violation. NGPL argues that CIG failed to connect its lost profits to its antitrust claim. NGPL purchased natural gas from CIG, not transportation services. It thus argues that CIG's lost profits resulted from lost sales to NGPL (as opposed to lost opportunities to transport Wyoming natural gas) and that CIG failed to prove that it lost profits on the transportation of Wyoming natural gas. NGPL therefore reasons that CIG failed to prove that it lost profits in the market for the long-distance transportation of Wyoming natural gas.

The testimony of CIG's damage expert, Dr. Rhodes, belies NGPL's assertion that CIG's lost profits are unconnected to the long-distance transportation of natural gas. Dr. Rhodes testified that he examined CIG's variable costs, fixed costs and return on investment. Variable costs are the costs of acquiring and selling gas to other companies. Fixed costs are the costs of building and maintaining a pipeline. Return on investment is the owner's return of equity. Dr. Rhodes excluded variable costs from the calculation of lost profits. Tr. at 2556-58. Excluding variable costs eliminated lost sales of natural gas from the

damage calculation. Dr. Rhodes calculated past lost profits by subtracting F-1 fixed costs from H-1 fixed costs and multiplying the difference by the volumes not taken. Tr. at 2561. Subtracting F-1 from H-1 excludes field natural gas from the damage calculation and thus only measures CIG's transportation costs. CIG's past lost profits measure the profits its assets would have generated but for the antitrust violation. They are therefore related to the expected gain resulting from the attempt to monopolize. Because they represent the potential return on output of a competitor excluded from the market, lost profits are an appropriate measure of antitrust injury. Page, *supra*, 47 U.Chi.L.Rev. at 486-87. The jury therefore could reasonably conclude that CIG's past lost profits were connected to the long-distance transportation market. *But see infra* text at 1479-80 for a discussion of future lost profits.

Turning to the contention that CIG failed to show that it suffered lost profits from the transportation of Wyoming natural gas, evidence was presented that the movement of Wyoming gas through the CIG system to the H-1 delivery point depended on NGPL accepting delivery of that gas. All movement of Wyoming gas stopped when NGPL refused to take natural gas at the H-1 delivery point. The transportation of Wyoming natural gas is thus inextricably tied to the injury NGPL sought to inflict on CIG and the market. The jury could have concluded that SIG established that it lost profits on the sale of Wyoming natural gas and the CIG's injury flowed from the defendant's unlawful act. *Blue Shield of Virginia v. McCready*, 457 U.S. at 484, 102 S.Ct. at 2551.

NGPL argues that the shut-in and tie-up of CIG's pipeline capacity did not injure competition because CIG was not driven out of business. As the Court in *Brunswick* noted, however, plaintiffs seeking treble damages need not "prove an actual lessening of competition in order to recover . . . . [C]ompetitors may be able to prove antitrust injury before they actually are driven from the market

and competition is thereby lessened." *Id.* at 489 n. 14, 97 S.Ct. at 698 n. 14.

*Associated General Contractors* further bolsters the jury's verdict. Substantial evidence supports the jury's conclusion that the antitrust violation and CIG's injury were causally related and that Congress intended to remedy the type of injury CIG suffered. CIG alleged and the jury found, that NGPL specifically intended to harm CIG. No other class of persons was more directly injured and thus in a better position to enforce the antitrust laws. The claim is not speculative as that term was used in *Associated General Contractors.*[2] CIG presented evidence that its share of the market declined because of the shut-in, resulting in lost profits. Unlike *Associated General Contractors*, where the union could resort to the labor laws for redress, CIG lacked an alternative remedy. The jury's verdict is thus consistent with *Associated General Contractors.*

The verdict is also consistent with *Brunswick.* At issue in *Brunswick* was whether damages are recoverable for lost profits incurred when a competitor remains in business. *Id.* at 484, 97 S.Ct. at 695. The Court observed that the injury claimed was inimical to the purpose of the antitrust laws. *Id.* at 488, 97 S.Ct. at 697. Central to this conclusion was that plaintiffs sought damages for increased competition. *Id.* In contrast, CIG claimed that its lost profits flowed from a purposeful scheme to diminish competition. Further, CIG established actual injury in fact, whereas the plaintiff in *Brunswick* merely showed the loss of an expected wildfall. *Id.* Finally, unlike the situation in *Brunswick*, damages are not an anticompeti-

[2] In *Associated General Contractors*, the union failed to allege that any collective bargaining agreement was broken as a result of the violation, that the share of the market controlled by unionized firms had diminished, that union membership declined, or that its revenues decreased. *Associated General Contractors*, 459 U.S. at 542.

tive remedy. The jury's award of damages warns firms against excluding lower-priced competitors from the market by predatory conduct and thereby encourages stronger competition. *See* II P. Areeda & D. Turner, *Antitrust Law* ¶ 346, at 246-47 (1978).

The jury was instructed that CIG was required to prove a causal connection between the antitrust violation and injury to its business. Jury Instruction No. 42. The instruction also required the jury to find that the type of injury was one which the antitrust laws were intended to prevent and that the injury was attributable to some harm of competition. *Id.* The jury is presumed to follow the instructions given by the trial court. *United States v. Hall*, 805 F.2d 1410, 1417 (10th Cir.1986). Substantial evidence supports the jury's finding that CIG proved antitrust injury, and judgment notwithstanding the verdict cannot be granted on this ground.

2. Relevant Market

NGPL contends that CIG incorrectly defined the relevant market. The relevant market consists of the relevant product market and the relevant geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *Aspen Highlands Skiing Corp v. Aspen Skiing Co.*, 738 F.2d 1509, 1528 (10th Cir.1984), *aff'd*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). NGPL apparently concedes that Wyoming natural gas is the relevant product but disputes CIG's definition of the relevant market as the long-distance market for the transportation of that gas. NGPL also argues that the Court erred by instructing the jury on CIG's theory of the relevant market.

The relevant geographic market is the geographic area in which sellers and buyers of products or services do business. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (1961); *United States v. Grinnell Corp.*, 384 U.S. 563, 588-89, 86 S.Ct.

1698, 1712-13 16 L.Ed.2d 778 (1966) (Fortas, J, dissenting). The boundaries of the relevant market must correspond to the commercial realities of the industry and be economically significant. *Brown Shoe Co. v. United States*, 370 U.S. at 336-37, 82 S.Ct. at 1529-30.

CIG claimed that the relevant market was the long-distance market for transportation of Wyoming gas from producing areas within Wyoming and the Overthrust to points of interconnection with major interstate trunk-lines. NGPL contends that the relevant market must include local transportation to cities such as Denver and Salt Lake City. NGPL submitted data showing that substantial volumes of gas produced in the Overthrust were consumed in Wyoming Colorado and Utah. Tr. at 7453; Defendants' Ex. 2060. CIG offered evidence that, by the early 1986s, production of natural gas in the Overthrust outstripped local consumption. Tr. at 1453-67; Plaintiff's Ex. 1754, 1755, 1756. Although NGPL's expert, Dr. George R. Hall, challenged CIG's defintion of the relevant market, he testified that by 1983 production exceeded local consumption by 266 billion cubic feet. Tr. at 7454. CIG thus argued that transportation to local markets did not afford a real choice to producers and shippers of Wyoming gas, because demand was greater in midwestern and eastern markets.

In *United States v. Grinnell Corp.*, 384 U.S. 563, 575, 86 S.Ct. 1698, 1706, 16 L.Ed.2d 778 (1966), the Supreme Court determined that the relevant geographic market for fire and burglary protection services provided by defendants' central stations was a national market, although the individual stations only served areas within a twenty-five mile radius. The Court reasoned that "the business of providing such services is operated on a national level" and that the "national market . . . reflects the reality of the way . . . [defendants] built and conduct their services." *Id.* at 575, 576, 86 S.Ct. at 1706. In reaching this conclusion, the Court looked to the existence of national

planning, agreements covering activities in many States, the multistate nature of the business, and the existence of nationwide inspection, certification and rate-making. *Id.* at 575, 86 S.Ct. at 1706.

In this case, the jury heard evidence that natural gas pipeline companies conduct interstate business subject to national setting of prices, rates and terms by the Federal Energy Regulatory Commission (FERC). The Service Agreement covered activities in many States. NGPL's stated objective for the Trailblazer System was to "move natural gas from the Overthrust Area of Wyoming to interconnections with existing major interstate pipeline systems for delivery of substantial quantities of Rocky Mountain gas to eastern and mid-western markets." As in *Grinnell*, the jury could reasonably conclude that CIG's definition of the relevant market corresponded to the commercial realities of the industry and was economically significant.

The determination of the relevant market is normally a question of fact. *Telex Corp. v. International Business Mach. Corp.* 510 F.2d 894, 915 (10th Cir.) (per curiam), *cert. dismissed*, 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244 (1975). Where each party presents substantial evidence concerning the appropriate relevant market, the issue becomes a jury question. *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 246 (10th Cir.1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977). NGPL contends, however, that the relevant market instruction tainted the jury's finding. NGPL Brief at 20-21.

This argument is without merit. Counsel failed to apprise the Court of its objection before the jury retired. Further, NGPL's proposed instruction on the relevant market included language almost identical to that which it now describes as erroneous.

Error may not be assigned to the giving of an instruction unless, before the jury retires, the objecting party

raises an objection and distinctly states "the matter to which he objects and the grounds of his objection." Fed. R.Civ.P. 51. The objection must be sufficiently specific to bring into focus the precise nature of the alleged error. *Rogers v. Northern Rio Arriba Elec. Coop., Inc.*, 580 F.2d 1039, 1042 (10th Cir. 1978). At the instruction conference, NGPL objected to the organization of the relevant market instruction and recommended moving one of the paragraphs in the instruction. The Court accepted this suggestion, and counsel indicated that the instruction was acceptable. Tr. at 8468-70. NGPL now asserts that the instruction invited the jury to define the relevant market as the long-distance transportation of natural gas. NGPL Brief at 20. Under these circumstances, the Court was not apprised of NGPL's present position before instructing the jury.

NGPL's present objection also overlooks its earlier representations to the Court. The instruction given to the jury said that "Colorado Interstate claims that the relevant service market is the transportation of natural gas from producing areas to interconnections with major interstate trunklines." Jury Instruction No. 30. NGPL's proposed instruction stated that "Colorado Interstate claims that the relevant market is the long-distance transportation of natural gas from producing areas within the state of Wyoming and the Overthrust region." DEFENDANTS' AND COUNTERCLAIM PLAINTIFFS' THIRD SET OF REVISED AND SUPPLEMENTAL JURY INSTRUCTIONS, NATURAL'S FIRST PROPOSED INSTRUCTION NO. 25 [Relevant Market]. NGPL's proposed instruction is virtually identical to the charge to the jury.

Finally, the instruction is not patently erroneous or prejudicial. *See Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 925 (10th Cir.), *cert. denied*, 469 U.S. 853, 105 S.Ct. 176, 83 L.Ed.2d 110 (1984) (jury instruction reviewed under a plainly erroneous standard

where objection not tendered before jury retires). The instruction incorporates the applicable legal standards. Substantial evidence supports the jury's conclusion that CIG proved the existence of a relevant market. Judgment notwithstanding the verdict is inappropriate in these circumstances.

3. Dangerous Probability of Success

A dangerous probability of success is the probability of attaining the power to control prices and exclude competition in the relevant market. *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc.*, 783 F.2d 159, 162 (10th Cir. 1986). NGPL contends that FERC's regulation of natural gas pipelines precludes a dangerous probability of success as a matter of law. It also claims that the jury's finding of a dangerous probability of success is against the weight of the evidence.

FERC's control of prices and market entry, NGPL argues, prevents any pipeline from controlling prices and excluding competition. The Natural Gas Act, however, does not insulate companies within its purview from the antitrust laws. *California v. Federal Power Comm'n*, 369 U.S. 482, 485-86, 82 S.Ct. 901, 903-04, 8 L.Ed.2d 54 (1962). Antitrust liability may arise despite the existence of pervasive regulatory control. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374, 93 S.Ct. 1022, 1028, 35 L.Ed.2d 359 (1973).

Two cases suggest that agency regulations may foreclose a probability of successful monopolization. In *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 354 (5th Cir.), *cert. denied*, 449 U.S. 870, 101 S.Ct. 208, 66 L.Ed.2d 90 (1980), the court determined that a municipal power company lacked the power to control prices and exclude competition. The defendant power company was the only franchised electric utility in the Houston area and constituted a "natural monopoly for the distribution of electric power." *Id.* at 345. In con-

trast, CIG and NGPL compete within the same market. As the court noted, violations of the antitrust laws can occur when regulated industries actually compete and anti-competitive activity surfaces. *Id.* at 354-55. Because neither CIG nor NGPL holds the sole franchise for transportation of natural gas from the Overthrust, the jury's finding of dangerous probability of success is consistent with *Almeda Mall.*

*Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1375-76 (5th Cir.), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980), arose from the defendant's refusal to provide interconnections to a smaller local competitor. The court said that the existence of regulatory control is relevant to the existence of monopoly power and "may even prohibit a finding of such power as a matter of law." *Id.* at 1386-87. The court held, however, that the regulatory scheme is relevant evidence of monopoly power. *Id.* at 1386. Whether the defendant possessed such power is a jury question. *Id.* The mere fact of extensive federal regulation thus does not immunize NGPL from antitrust liability.

Regulation of the industry is nevertheless relevant evidence of the power to control prices and exclude competition. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1105-06 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983). FERC's role in this case surfaced early in the trial. The first witness, Mr. O'Connell, indicated that FERC regulates the industry. Tr. at 211-12. He was extensively cross-examined on the course and outcome of FERC proceedings. Tr. at 578-97. The record is replete with testimony concerning FERC orders. Witnesses were permitted to explain their understanding of FERC orders to the extent they relied on those orders in taking action or forming opinions. *See, e.g.*, testimony of Dr. Leitzinger, Mr. Morgan, Dr. Rhodes, Mr. Grubb, Mr. Kitchens, Mr.

McElligott, Mr. Morrow, Mr. Oxford, Mr. Lawrence, Dr. Hall. NGPL thoroughly explored FERC Regulations and FERC Order 380 during its cross-examination of Mr. Morgan. Tr. at 2328-34, 2391-94. Testimony about FERC was excluded only when unduly prejudicial or barred by Fed.R.Evid. 201. The existence of the regulatory scheme was thus presented to the jury.

NGPL did not request, or object to the absence of, jury instructions stating that FERC's regulatory authority should be considered in determining the existence of a dangerous probability of success. *See Castleberry v. NRM Corp.*, 470 F.2d 1113, 1120 (10th Cir.1972) (plaintiff's failure to request jury instruction on one theory of liability, coupled with the statement that counsel did not object to defendant's instructions, precluded appeal of court's failure to instruct jury on omitted theory of liability). NGPL objected to the instruction given on the ground that NGPL's market share was insufficient to permit a finding of dangerous probability of success. Tr. at 8476-81. NGPL sought a directed verdict on the ground that CIG failed to prove a dangerous probability of success. The reasoning was that NGPL possessed an insufficient market share. Regulatory control by FERC was not mentioned. Tr. at 8381-84. NGPL did not assert its present position at trial.

FERC's authority over CIG and NGPL does not, as a matter of law, preclude a finding that NGPL possessed the power to control prices and exclude competition. Even if it did, NGPL failed to raise the issue during trial. *See Glasscock v. Wilson Constructors, Inc.*, 627 F.2d 1065, 1068 (10th Cir.1980) (a party may not complain of error which it induced or invited); *Rogers v. Northern Rio Arriba Elec. Coop., Inc.*, 580 F.2d 1039, 1042 (10th Cir. 1978) (the purpose of Fed.R.Civ.P. 51 is to clarify the objecting party's position and give the trial court an opportunity to make changes). The remaining issue is whether the jury's findings of a dangerous probability of success is against the weight of the evidence.

A dangerous probability of success may be shown by market power which in turn may be demonstrated through market share, expressed as a precent of the relevant market. *Shoppin' Bag*, 783 F.2d at 161. Determining market power also requires an examination of the defendant's market strength as measured by the number and strength of its competitors, ease of market entry, consumer sensitivity to changes in price, innovations in the market and whether the defendant is a multimarket firm. *Id.* at 162. Some proof of overt predatory conduct is also required. *Id.* at 163.

CIG calculated market shares based on capacity control of the Trailblazer System (but excluded the WIC pipeline). The owners of the three pipeline segments contributed to the project's construction. In return each received ownership shares. They also received a share of the Trailblazer System's total pipeline capacity in proportion to the amount of debt assumed. Capacity control, factored for the system's different pipeline sizes, constituted each party's market share. Using this method, NGPL's market share was over 50 percent. Tr. at 1479-95. NGPL argued that CIG's methodology skews the parties' positions in the market. It calculated market share based on each partner's ownership of the Trailblazer System. By this method, NGPL's market share is only 33 percent.

The central issue is the defendant's economic power in the relevant market. *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296, 306 (10th Cir.1975), *cert. denied*, 425 U.S. 907, 96 S.Ct. 1501, 47 L.Ed.2d 758 (1976). Actual ownership of the Trailblazer System is one measure of economic power in the market for the long-distance transportation of Wyoming natural gas. Control of the system's overall transportation capacity is an equally valid indicator, especially when coupled with evidence showing that volumes passing through the Trailblazer System increased substantially following the shut-in. Tr. at 1585-87; Plaintiff's Ex. 1763. Sufficient evidence was thus pre-

sented from which the jury could conclude that NGPL possessed more than a 50 percent share of the relevant market.

Factors besides market share must be considered. *Shoppin' Bag*, 783 F.2d at 162. CIG's evidence of the parties' strength showed that, prior to the shut-in, NGPL controlled 41 percent of the market compared with CIG's 23 percent share. After the shut-in, CIG controlled 13 percent while NGPL's share rose to 54 percent. Plaintiff's Ex. 1758. NGPL's studies showed that CIG controlled nearly 81 percent of the pipeline capacity coming out of Wyoming. Tr. at 6468-69; Defendants' Ex. 3094. The evidence also showed that FERC regulations made market entry difficult. Finally, at the time of the shut-in, demand for natural gas was declining. One of Champlin Petroleum's gas contract managers, Mr. Gordon Daty, testified that NGPL was the only firm interested in Champlin's Whitney Canyon reserves following CIG's release. As a consequence, Champlin received a lower price for Whitney Canyon gas. NGPL then increased its transportation charges for that gas. Tr. at 4328-35. The jury thus could have concluded that the relevant market was vulnerable to control of prices. Evidence was also presented that CIG was excluded from the market by NGPL's aggressive conduct. *See supra* text at 1460-61.

The existence of a dangerous probability of success is a jury question. *Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d at 1387. The jury apparently rejected NGPL's market share data and accepted CIG's. The weight of the evidence supports the jury's findings that NGPL possessed the power to control prices and exclude competition. That evidence showed NGPL's aggressive conduct, CIG's exclusion from the market, the market's vulnerability to increases in transportation prices and that prices actually increased. This constitutes sufficient evidence from which the jury could conclude that CIG proved a dangerous probability of success by a preponderance of the evidence.

4. Specific Intent to Monopolize and Anticompetitive Conduct

A violation of § 2 of the Sherman Act requires a specific intent to monopolize. *United States Steel Corp. v. Fortner Enter. Inc.*, 429 U.S. 610, 612 n. 1, 97 S.Ct. 861, 863 n. 1, 51 L.Ed.2d 80 (1977); *Shoppin' Bag*, 783 F.2d at 161. A desire to increase market share is insufficient. *United States Steel Corp. v. Fortner Enter. Inc.*, 429 U.S. at 612 n. 1, 97 S.Ct. 863 n. 1. A defendant must act with specific intent to destroy competition or build a monopoly. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626, 73 S.Ct. 872, 890, 97 L.Ed. 1277 (1953). Specific intent to monopolize is defined as an intent to acquire market power and exclude others from competition. *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d at 306 (quoting *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 586 (10th Cir.1961)).

Proof of exclusionary intent requires evidence that a business intends to use or does use unfair weapons. *Pacific Eng'g & Prod. Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir. 1977). Specific intent may be proved by direct evidence or inferred from a firm's anticompetitive conduct. *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585, 608 n. 39, 105 S.Ct. 2847, 2860 n. 39, 86 L.Ed.2d 467, 484 n. 39 (1985) (quoting R. Bork, *The Antitrust Paradox* 157 (1978)). Absent direct evidence of specific intent to monopolize, defendant's conduct must substantially restrain trade, clearly threaten competition or be clearly exclusionary. *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1374 (9th Cir.1983) (quoting *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1028 (9th Cir.1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982)). Specific intent may not be inferred from activities motivated solely by legitimate business considerations. 16B *Business Organizations*, J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.02[5] (1986).

The issues are whether a jury could resaonably find that NGPL specifically intended to monopolize the relevant market and, if so, whether NGPL's activities were motivated solely by legitimate business considerations. The relevant factors in examining these questions are whether the acts are ordinary business practices typical of those used in a competitive market and whether the acts constitute an attempt to acquire monopoly power. *Telex Corp. v. International Business Mach. Corp.*, 510 F.2d 894, 925-26 (10th Cir.) (per curiam), *cert. dismissed*, 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244 (1975).

CIG's evidence of specific intent to monopolize came partly from internal NGPL memoranda. In June 1983, CIG proposed to change the H-1 delivery point from Texas to the entry point of the Trailblazer Pipeline. The change would have freed the southern part of CIG's system from the effects of the shut-in. Tr. at 1540-41. Mr. Hannig, a project analyst for NGPL, observed that "[t]here are many implications involved in making this switch," including whether "this [would] free-up capacity on CIG's system so they could transport for others." Plaintiff's Ex. 1325. In August 1984, CIG invited NGPL to change or "renominate" the volumes of natural gas NGPL was entitled to receive under the Service Agreement. A smaller nomination by NGPL would have reduced CIG's obligation to deliver natural gas to NGPL and thus increased CIG's capacity to serve other customers. Tr. at 1544. In a memorandum to Mr. Eberst, NGPL's Vice-President for Marketing and Rates Mr. Wozbut, NGPL's Rate Coordinator, recognized that "nominations of entitlements determine whether CIG's system can satisfy customer requirements on a supply and capacity basis." Plaintiff's Ex. 763. The renomination proposal forced NGPL to "determine the status of CIG as a continuing supply source and possibly as a major competitor for Rocky Mountain gas. Management must determine whether . . . freeing up of CIG capacity may hinder Natural in any of its endeavors."

*Id.* NGPL nominated its full capacity under the Service Agreement yet refused to accept delivery of natural gas when the nomination became effective. Tr. at 8260; Plaintiff's Ex. 1769.

The evidence also showed that NGPL singled out CIG from other NGPL suppliers and ignored its own gas scheduling policies. NGPL scheduled its natural gas requirements by using a priority list of suppliers. Beginning with the last source on the priority list, NGPL would turn each supplier up to its daily contract quantity or DCQ, progressing up the list to each successive source. CIG, however, was not assigned a DCQ level on the priority list. Each time NGPL went through its priority list, CIG was skipped until all other sources had been turned up to their maximum levels. Tr. at 2202-37.

CIG argued that NGPL's motive for the shut-in was to eliminate lower-priced competition from CIG. The Trailblazer System was operating at only 60 percent of planned levels and at approximately 50 percent of capacity. Tr. at 1569, 1577-78; Plaintiff's Ex. 1333, 483, 399, 500. The evidence shows that NGPL viewed CIG as a major competitor and intended to hinder CIG's ability to compete by controlling its pipeline capacity. The jury could have concluded that NGPL's conduct threatened competition by excluding CIG as a competitor and thus inferred that NGPL specifically intended to monopolize the relevant market. The question is whether the jury could properly make that inference or whether NGPL's conduct was motivated solely by legitimate business concerns.

NGPL defended the shut-in by claiming that CIG's prices were too high, that it needed to reduce its own rates and its take or pay liability to protect itself from potential liability under the *United Gas Pipeline* case, and that it simply had an oversupply of natural gas. The evidence contradicts the first assertion. After the shut-in NGPL repeatedly purchased gas from other suppliers that was more expensive than CIG's F-1 or H-1 gas. Tr. at

1649-51, 2436-39; Plaintiff's Ex. 1433, 1590. Further, a memorandum from Mr. Pasteris to Mr. Grubb written in August 1984 noted that "CIG's sales to Natural are currently priced at $3.18/Mcf for F-1 and $3.63/Mcf for H-1 gas. Given that this is the price delivered to Natural's mainline the costs are not unreasonable." Plaintiff's Ex. 765. NGPL in fact thought that CIG was an attractive, low-cost supplier. Plaintiff's Ex. 757.

NGPL also contended that it needed to reduce a potential take or pay liability of $215 million in 1983. Tr. at 3515-16; Defendants' Ex. 363. CIG experts challenged that evidence. Tr. at 2396. NGPL studies showed "a significant decrease in projected take-or-pay exposure" of $130 million through fiscal 1983. Plaintiff's Ex. 902-A. In addition, "Canadian sources accounted for $111 million of the total, with Great Lakes projected at $77 million and . . . Pro-Gas at $34 million." *Id.* Companies other than CIG thus contributed substantially to NGPL's take-or-pay problems.

The decision in *United Gas Pipeline* was also used to justify the shut-in. The adminstrative law judge in the *United Gas Pipeline* case invalidated minimum bill provisions similar to the provision in the Service Agreement. NGPL feared that it might be found to have acted imprudently if it continued to purchase CIG's H-1 gas and decided to reduce purchases of H-1 gas. Tr. at 5292-97. NGPL also claimed that it needed to reduce its own rates to jurisdictional customers. CIG pointed out that, after the shut-in, NGPL repeatedly purchased more expensive gas from other suppliers. Tr. at 1649-51, 2436-39; Plaintiff's Ex. 1433, 1590.

NGPL finally asserted that it shut-in 107 million cubic feet per day of H-1 gas to reduce an oversupply of natural gas. On the day after the shut-in, however, NGPL's takes from other suppliers increased by 93 million cubic feet per day. Tr. at 2271; Plaintiff's Ex. 1986. Assuming that NGPL wanted to decrease its oversupply, to reduce its po-

tential take-or-pay liability, or to avoid paying for costly gas, it could have done so by nominating smaller volumes in 1984. NGPL instead chose to renominate the same volumes but not to take any gas from CIG.

Evidence of specific intent alone cannot sustain a claim of attempted monopolization without corroborating evidence of conduct. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1028 (9th Cir. 1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982). Ordinary business practices typical of those used in a competitive market are not anti-competitive. *Telex Corp. v. International Business Mach. Corp.*, 510 F.2d at 925-26. The conclusion that conduct is predatory must be based not on its effect on a competitor but on its effect on competition. *Pacific Eng'g & Prod. Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d at 795.

The jury rejected NGPL's justification for its conduct and apparently decided that NGPL was not predominantly motivated by legitimate business objectives. This conclusion is based on sharply conflicting evidence and cannot be ignored simply because the Court's view might be different. *Ryder v. City of Topeka*, 814 F.2d 1412, 1418, 1420-21 (10th Cir.1987). The evidence supports a finding that NGPL acted to destroy competition and create a monopoly. NGPL's acts are not ordinary business practices typical of those used in a competitive market. *Telex Corp. v. International Business Mach. Corp.*, 510 F.2d at 925-26. NGPL did more than merely refuse to do business with a rival. Given an opportunity to renominate entitlements and avoid the cost and supply problems caused by the Service Agreement, NGPL instead chose to nominate the same volumes and thus to prevent CIG from offering a low-cost transportation alternative. The antitrust laws are as much violated by the prevention of competition as by its destruction. *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed.2d 1236 (1948). The jury could therefore conclude that NGPL's conduct was anti-

competitive and that NGPL specifically intended to monopolize the long-distance transportation market for Wyoming natural gas.

B. Tortious Interference With Contract

CIG shut-in Champlin Petroleum's Whitney Canyon reserves because NGPL's shut-in created an oversupply of natural gas in CIG's system. Tr. 265-68; 994-1003; 276-77. NGPL negotiated with Champlin to acquire the Whitney Canyon reserves. A letter from NGPL to Champlin summarized their eventual agreement. The letter stated that the sale was subject to a contract between Champlin and CIG. NGPL agreed to increase the purchase price, however, if CIG released its rights to the gas. Plaintiff's Ex. 1476. When CIG attempted to negotiate revisions in the Whitney Canyon contrast, Champlin insisted that CIG reease its rights. CIG did so, and NGPL immediately acquired the rights to the Whitney Canyon reserves.

The jury found that NGPL tortiously interfered with CIG's contract with Champlin based upon the *Restatement (Second) of Torts* § 766A (1979). NGPL contends that neither Colorado nor Wyoming recognize § 766A. Assuming that the courts would recognize a cause of action under § 766A, NGPL argues that the Service Agreement conferred an absolute right not to buy CIG's gas and that its conduct was therefore proper. NGPL finally urges that CIG did not suffer cognizable damages under § 774A of the Restatement.

Wyoming would recognize a cause of action under § 766A. The tort of intentional interference with contract is accepted in Wyoming. *Basin Elec. Power Co-op. v. Howton*, 603 P.2d 402, 403 (Wyo.1979). The Restatement guided the Wyoming Supreme Court in defining the tort. *See, e.g., Martin v. Wing*, 667 P.2d 1159, 1162 (Wyo.1983) (recognizing cause of action under *Restatement (Second) of Torts* § 766B); *Wartensleben v. Willey*, 415 P.2d 613, 614 (Wyo.1966) (recognizing cause of ac-

tion under *Restatement of Torts* § 766). Having accepted section 766 and 766B, the Wyoming Supreme Court would recognize a cause of action under § 766A.

The Restatement provides that:

> [o]ne who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

*Restatement (Second) of Torts* § 766A (1979). The elements of the tort include the existence of a valid contractual relationship or business expectancy, knowledge of the relationship on the part of the interferor, intentional and improper interference causing a breach or termination of the relationship, and resultant damage. *Texas West Oil and Gas Corp. v. Fitzgerald*, 726 P.2d 1056, 1062 (Wyo.1986).

CIG and Champlin unquestionably had a valid contractual relationship. The evidence shows that NGPL knew of the existence of the contract. Plaintiff's Ex. 1476. The salient issues are whether NGPL intentionally and improperly interfered with that relationship and whether the interference damaged CIG.

NGPL argues that its conduct was justified. The Service Agreement permits NGPL to refuse delivery of CIG's gas and pay for volumes not taken. NGPL construes the take-or-pay option as an absolute right to shut-in CIG's gas. Exercising this contractual right, NGPL urges, cannot constitute an improper interference with contract.

This argument misapprehends CIG's claim. NGPL's tortious act was not the shut-in of CIG's gas. Instead CIG claimed that NGPL used the shut-in to force CIG to release the Whitney Canyon reserves so that NGPL could

appropriate the rights to that gas. The argument that CIG consented to this conduct is specious. To be effective, consent must be given to the particular conduct. Action exceeding the scope of the consent is not privileged. *Restatement (Second) of Torts* § 892A & comment c. No showing was made that CIG consented to NGPL's acquisition of the Whitney Canyon reserves. NGPL's rights under the Service Agreement do not permit an interference with CIG's contractual relations with third parties.

The cases cited by NGPL to support its position are inapposite. In *J.C. Penney Co., Inc. v. Davis & Davis, Inc.*, 158 Ga. App 169, 279 SE2d 461 (1981), ABS contracted to repair the defendant's buildings. ABS subcontracted with the plaintiff. Defendant rejected plaintiff's work. Although conceding that its work was defective, plaintiff brought an action for tortious interference with its contract with ABS. The court, noting that the defendant had a right to reject nonconforming work, held that plaintiff failed to show that defendant's actions were wrongful. In *Mac Enter., Inc. v. Del. E. Webb Dev. Co.*, 132 Ariz. 331, 645 P2d 1245 (Ariz.App.1982), the defendant leased its golf shops to ProShops which in turn sublet a concession to the plaintiff. The lease entitled the defendant to terminate the lease at any time by giving written notice. When the defendant cancelled its lease with ProShops, the plaintiff sued for tortious interference with plaintiff's contract with ProShops. The court held that the defendant's right to cancel the lease entitled it to judgment as a matter of law. Neither case is relevant. Each simply affirms the settled rule that an action for tortious interference will not lie against a party to the contract. *See Krenild v. Taylor*, 594 P.2d 972, 977 (Wyo.1979). NGPL was a stranger to the contract between CIG and Champlin. An action is maintainable in these circumstances. *Id.*

The propriety of an actor's interference with another's contractual relationship depends on several factors. These include the nature of the conduct, the defendant's motive,

the plaintiff's interests, the interest sought to be advanced by the defendant, the social interest in protecting each party's interests, the proximity or remoteness of the conduct to the interference, and the relations between the parties. *Toltec Watershed Improvement Dist. v. Johnston*, 717 P.2d 808, 814 (Wyo.1986) (quoting *Restatement (Second) of Torts* § 767). Whether the conduct is justified is a question of fact for the jury. *Basin Elec. Power Co-op.—Missouri Basin Power Project v. Howton*, 603 P.2d 402, 403 (Wyo.1979). Defendant bears the burden of proof on this issue. *Id.* at 405. If the defendant had no desire to interfere and merely knew that interference would be an incident of its conduct, the interference may be found to be proper. *Restatement (Second) of Torts* § 766A comment e. NGPL did not merely shut-in CIG's gas knowing that the shut-in might disrupt CIG's relationship with Champlin. NGPL instead acted purposefully to acquire the rights to the Whitney Canyon reserves. Ample evidence suports the jury's finding that NGPL's conduct was improper.

Similarly, the jury could rationally conclude that NGPL intentionally interfered with CIG's contract in order to acquire the Whitney Canyon reserves. Malice is not required to establish intent. *Toltec Watershed Improvement Dist. v. Johnston*, 717 P.2d at 814. Interference is intentional if the actor desires the result or knows that the interference is substantially certain to result. *Restatement (Second) of Torts* § 766A comment e. The evidence showed that Champlin took the initiative in opening negotiations with NGPL. Tr. at 4026. Nevertheless Champlin demanded that CIG release its rights to the Whitney Canyon reserves and NGPL immediately snatched up those rights after CIG released them. The jury could have concluded that NGPL desired this result or knew that it was substantially certain to occur. The element of intent consequently was met.

NGPL finally argues that CIG failed to prove damages resulting from NGPL's conduct. NGPL argues that such

damage requires evidence that NGPL's acts made CIG's performance of the Champlin contract more expensive or burdensome.

The tort of intentional interference with contract is aimed at conduct preventing the plaintiff from performing his own contract or making performance more expensive or burdensome. *Restatement (Second) of Torts* § 767 comment a. The cause of action protects plaintiffs from losing the benefit of a third party's performance. *Id.* § 766A comment c. Plaintiffs may consequently recover damages in an amount compensating for all of the detriment proximately caused by the breach of duty. *Texas West Oil and Gas Corp. v. Fitzgerald*, 726 P.2d at 1064. Damages may include the pecuniary loss of the benefits of the contract, consequential losses for which the interference is a legal cause, or other pecuniary losses. *Restatement (Second) of Torts* § 774A & comment b. Section 766A is phrased in the alternative: conduct is tortious if it makes performance more expensive or burdensome or if it prevents the plaintiff from performing its contractual obligations. *Id.* § 766A. A showing that the defendant's acts made performance more expensive or burdensome is not required to recover damages.

CIG presented evidence showing $15,204,555 in damages resulting from demand charges paid to Canyon Compression and Overthrust Pipeline Company. Tr. at 2623-25; Plaintiff's Ex. 1777. CIG also sought restitution of lost benefits under its contract with Champlin. These damages totaled $24,026,517. Tr. at 2623-25, 2638; Plaintiff's Ex. 1777, 1775. Whether the jury erred in awarding these sums as damages will be considered later. Nevertheless, substantial evidence supports the jury's finding that CIG was damaged as a result of NGPL's intentional and improper interference with CIG's contract with Champlin Petroleum. The motion for judgment nothwithstanding the verdict must therefore be denied.

C. Breach of Contract

The Service Agreement defines CIG's duties as a seller and NGPL's obligations as a buyer of natural gas. The minimum daily take provision of Section 2 states that "Buyer shall not request total daily volumes on any day hereunder less than 90 percent of the General Daily Entitlement." Section 4 contains a minimum annual bill requirement providing that:

> The minimum bill shall be on a fiscal year basis and shall be determined by multiplying the Total Annual Entitlement by a factor of 90 percent, such volume hereinafter referred to as "Minimum Volume" . . . .
>
> In the event Buyer's actual purchases for the fiscal year are less than the Minimum Volume, then any deficiency shall be billed at the unit rate under Rate Schedule F-1 . . . .

The jury found that NGPL was in breach of the Service Agreement. NGPL contends that the lack of a filed rate with the Federal Energy Regulatory Commission ("FERC" or "the Commission") and the res judicata effect of the Commission's actions bar recovery of H-1 fixed costs under Section 2. NGPL further argues that Section 4 is the exclusive remedy for a breach of Section 2. NGPL finally argues that CIG's course of performance vitiates any breach of contract claim.

1. FERC Orders and Regulations

On October 18, 1983, a FERC Administrative Law Judge found the minimum bill provisions of Sections 2 and 4 to be unjust and unreasonable. *Colorado Interstate Gas Co.*, No. RP82-54-000, 25 FERC ¶ 63,012 (1983). The Commission affirmed the ALJ on May 25, 1984, and ordered CIG to eliminate variable costs from its minimum bill to NGPL. *Id.* ¶ 61,315 at 61,583, 61,584 (1984). The Commission said, however, that "our conclusion that

CIG's minimum bill to Natural is not just and reasonable does not mean that CIG may not employ a minimum bill in serving that customer." *Id.* at 61,583.

CIG filed amended tariffs in an attempt to comply with the May 25, 1984 order. CIG dropped variable costs from the minimum bill but also sought to amend the Service Agreement to permit collection of minimum bill deficiency payments using the H-1 rate for H-1 deficiencies and the F-1 rate for F-1 deficiencies. The compliance filings were rejected, and CIG appealed to the Commission. *Colorado Interstate Gas Co.*, No. RP82-54-014, 29 FERC ¶ 61,124 at 61,243 (1984). CIG argued before the Commission that the May 25, 1984 order permitted recovery of fixed costs allocable to NGPL under the H-1 and F-1 rates. On October 31, 1984, FERC rejected the appeal, reasoning that:

> . . . the May 25, 1984 order did not definitively rule on the proper level of fixed cost recovery in CIG's minimum bill. Instead, the Commission found that the record was insufficient to determine whether the existing level of fixed cost recovery . . . in the minimum bill is just and reasonable. We therefore did not order any changes in the existing level of fixed cost recovery.
>
> . . . [Order No. 380-C] removed variable costs from minimum commodity bills and did not address what level of fixed costs should be included. *In fact, the Commission expressly declined to rule on whether any fixed costs should be recovered through a minimum bill.*

*Id.* at 61,244 (emphasis added). CIG appealed this decision. The United States Tenth Circuit Court of Appeals affirmed, holding that the Commission's decision was rational and supported by substantial evidence. *Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803, 811 (10th Cir.1986). A subsequent compliance filing was accepted by FERC. 30 FERC ¶ 61,073 (1985).

NGPL concludes that FERC's actions preclude recovery of damages predicated upon H-1 fixed costs. It argues that FERC allowed CIG to charge only the F-1 fixed cost of gas not taken, that CIG thus has no H-1 tariff on file with FERC, and that damages based on H-1 fixed costs are consequently barred by the filed rate doctrine and principles of res judicata. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584, 101 S.Ct. 2925, 2933, 69 L.Ed.2d 856 (1981) (courts may not award damages based on rates other than those approved by FERC).

The Commission's orders of May 25 and October 31, 1984 do not bar recovery of damages which are calculated from H-1 fixed costs. The emphasized portion of the October 31 order states that FERC had not decided whether fixed costs were recoverable. CIG's compliance filings were rejected not because FERC determined that H-1 fixed costs were not recoverable but rather because CIG's compliance filings exceeded the scope of the May 25 order, which did not specifically permit modification of the minimum bill to recover fixed costs. *See Colorado Interstate Gas Co. v. FERC*, 791 F.2d at 810.

Other FERC orders reinforce this view. FERC Order No. 380 precludes recovery of the variable costs of gas not taken. *FERC Statutes and Regulations* ¶ 30,571 (1984) (codified at 18 C.F.R. § 154.111 (1986)). Order No. 380-C applied Order No. 380 to minimum bill provisions. *Id.* ¶ 30,607 at 31,197. The Commission noted however, that "[b]y making the rule applicable to . . . minimum take provisions, *no additional refiling requirements are imposed on the pipeline.*" *Id.* at 31,196 (emphasis added). Rate schedules must be refiled only if they fail to state purchase gas costs separately. 18 C.F.R. § 154.111 (a)(3)(ii). CIG's commodity rate subsumed H-1 and F-1 fixed costs. This tariff remained effective to the extent it excluded recovery of variable costs. Order No. 380-D, 29 FERC ¶ 61,332 at 61,692 (1984). CIG therefore had a filed H-1 rate.

The Commission's order of June 19, 1985 demonstrates that FERC did not abrogate the minimum daily take requirement of Section 2. In February 1987, NGPL filed a motion before FERC to eliminate the minimum take provision. The Commission denied the motion, concluding that the relief sought by NGPL was "not consistent with our prior orders in this case or with our regulations." *Colorado Interstate Gas Co.*, No. RP82-54-017, 31 FERC ¶ 61,325 at 61,743 (1985). The Commission, quoting Order No. 380-D, pointed out that:

> [m]inimum take provisions remain currently effective except to the extent that they operate to recover variable costs for gas not taken by the buyer. The Commission in Order No. 380-C only eliminated the recovery of *variable* costs under a pipeline's minimum take provision. In other words, minimum take provisions are treated in the same manner as minimum commodity bills. The *fixed* cost component included in a selling pipeline's commodity rate may still be recovered by that seller for the number of units of gas specified in the minimum take provision even where the buyer does not take that specified minimum amount.

*Id.* (emphasis in original). The Commission's determination that "the prior orders in Docket No. RP82-54 [do] not require CIG to eliminate the minimum take provision from its service agreement," *id.*, defeats NGPL's argument. FERC exercised its power to modify Section 2 but expressly affirmed CIG's right to recover fixed costs under the minimum take provision. The Commission's actions do not require the Court to set aside the jury's verdict.

2. Exclusive Remedy and Course of Performance

NGPL urges that Section 4 creates an exclusive remedy for breach of the Service Agreement. As NGPL reads it, the Service Agreement requires that NGPL pay the minimum bill as provided in Section 4 if NGPL chooses not to

purchase or receive 90 percent of the General Daily Entitlement. Section 4 must therefore be "the only remedy contained in the Service Agreement." NGPL Brief at 46. This argument ignores the basic principle that contractual remedies are optional unless "expressly agreed to be exclusive." U.C.C. § 2-719(1)(b). This subsection creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. Parties who intend a contractual provision to constitute a sole remedy must clearly express that intention. *Id.* comment 2. NGPL contends, however, that the record rebuts the U.C.C.'s presumption of nonexclusive remedies.

Every contract should be construed as a whole, giving effect to each portion of the instrument. *Colorado Milling & Elevator Co. v. Chicago, Rock Island & Pacific R.R. Co.*, 382 F.2d 834, 836 (10th Cir.1967). NGPL argues that construing Section 2 as an independent obligation makes Section 4 irrelevant, because a failure to take the General Daily Entitlement under Section 2 would produce a larger minimum annual bill than Section 4, which averages daily takes over a year.

This reading has two flaws. First, Section 4 does not provide that daily takes will be averaged in arriving at the annual minimum bill. It instead states that the minimum annual bill is determined by multiplying 90 percent times the "Total Annual Entitlement" (defined in Section 1 as 78,150,000 Mcf). This calculation produces the "Minimum Volume." The Minimum Volume is determined "on the basis of the average of several General Daily Entitlements" only "[i]f the specified General Daily Entitlement is revised during the fiscal year." The language of the Service Agreement does not support NGPL's argument. Second, construing Section 4 as an exclusive remedy reads Section 2 out of the Service Agreement. Sections 2 and 4 can be harmonized without eviscerating Section 2. The Service Agreement was executed in 1982, a time when natural gas was in relatively short

supply and when costs were generally high. Section 2 assures NGPL of a minimum daily volume of 170,000 Mcf during the winter (the "Swing Period"). NGPL is thus ensured a supply of natural gas during periods of high demand and short supply. In return, NGPL agreed to take 90 percent of the General Daily Entitlement, thereby assuring CIG's recovery of the high costs of purchasing and shipping the gas. Section 4 then sets forth the billing mechanism for the transaction. The two provisions can thus be given independent yet consistent content.

NGPL next argues that the jury ignored the parties' course of performance. The core of the argument is that CIG only tendered annual bills under Section 4. Whenever reasonable, a contract's express provisions and any course of performance should be given a consistent construction. U.C.C. § 2-208(2). The express terms of the contract govern in a conflict with the parties' course of performance. *Id.*; *KN Energy, Inc. v. Great Western Sugar Co.*, 698 P.2d 769, 770 (Colo.1985) (en banc). Nothing in Section 4 requires CIG to submit a claim under Section 4 for a breach of Section 2. CIG's course of performance is thus consistent with the express terms of the Service Agreement.

The terms of the U.C.C., a consistent construction of Sections 2 and 4, and the parties' course of performance support a conclusion that Section 4 is not an exclusive remedy for breach of the Service Agreement. CIG was accordingly entitled to resort to the remedies specified in the U.C.C. FERC exercised its statutory powers to modify Section 2 but did not preclude recovery of H-1 costs as damages in this action. Presented with this very issue, the Commission in its order of June 19, 1985, declined to challenge this suit as a collateral attack on its prior orders. *See Colorado Interstate Gas Co.*, No. RP82-54-017, 31 FERC ¶ 61,325 at n. 2. NGPL's motion for judgment notwithstanding the verdict on CIG's breach of contract claim must therefore be denied.

D. Breach of the Duty of Good Faith and Fair Dealing

The Uniform Commercial Code and the common law each impose on the parties to a contract the duty to perform in good faith. U.C.C. § 1-203; *Restatement (Second) of Contracts* § 205 (1981). Good faith normally requires "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19). In the case of merchants, good faith demands both "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.* § 2-103(1)(b). The implied covenant enjoins each party to "do nothing destructive of the other party's right to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to acomplish its purpose." *Conoco, Inc. v. Inman Oil Co., Inc.*, 774 F.2d 895, 908 (8th Cir.1985).

The jury found that NGPL violated its duty of good faith and fair dealing under the Service Agreement. NGPL advances four reasons to set aside the verdict. It first contends that the duty of good faith and fair dealing does not afford an independent cause of action. Even if a cause of action does exist, the exercise of valid contractual rights cannot violate the duty. NGPL further argues that no evidence supports the jury's verdict and, finally, that CIG failed to prove the reasonable commercial standards of fair dealing within the natural gas industry.

A majority of jurisdictions recognize the duty to perform a contract in good faith. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv.L.Rev. 369 (1980). As one court has observed, "it is unnecessary to speculate upon . . . acceptance or rejection [by the applicable state supreme court] of the modern doctrine of 'obligation to perform in good faith.' The doctrine . . . is simply a rechristening of fundamental principles of contract law." *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C.Cir.1984). The Colo-

rado and Wyoming legislatures adopted the U.C.C.'s definition of good faith. Colo.Rev.Stat. § 4-1-203 (1973); Wyo. Stat. § 34-21-122 (1977). Although the parties have not cited any relevant decision by the Colorado Supreme Court, the lower courts in that State seem inclined to recognize a cause of action for breach of the duty. *Layne v. Fort Carson Nat'l Bank*, 655 P.2d 856, 857 (Colo.App. 1982) (affirming summary judgment in favor of a lender on claim that lender violated the good faith requirements of the U.C.C.); *Ruff v. Yuma County Transp. Co.*, 690 P.2d 1296, 1298 (Colo.App. 1984) (recognizing applicability of *Restatement (Second) of Contracts* § 205). Wyoming's Supreme Court has implicitly recognized a cause of action for breach of the duty. *Wendling v. Cundall*, 568 P.2d 888, 890 (Wyo.1977) (applying U.C.C. good faith standard to contract for the sale of real estate). *See also Garner v. Hickman*, 709 P.2d 407, 411 (Wyo.1985) (discussing lender's duty of good faith and fair dealing in action for defective construction of a modular home). An independent cause of action exists for breach of the duty of good faith and fair dealing.

NGPL argues that, even if a cause of action is available, exercise of express contractual rights cannot constitute a breach of the duty. Section 1 of the Service Agreement permits NGPL to "pay for or to purchase and receive . . . [specified] quantities of natural gas." The Service Agreement does not obligate NGPL to accept deliveries of H-1 gas, NGPL argues, and thus it cannot breach the duty of good faith by refusing to do so.

In support of its argument, NGPL cites *VIR, Inc. v. Goodyear Tire & Rubber Co.*, 303 F.Supp. 773 (S.D.N.Y. 1969),[3] where plaintiff was to receive commission pay-

[3] NGPL also cites the decision in *Bill's Coal Co., Inc. v. Board of Pub. Util.*, 682 F.2d 883 (10th Cir. 1982). That case is inapposite. The court held that, absent some effect on either party's performance, urging an interpretation of a contract which does not reflect the parties' intent is not a breach or repudiation of a contract. *Id.* at 885. NGPL did not merely espouse a particular interpretation

ments for a specified term, but the contract also provided that Goodyear could terminate the payments at any time with or without cause. *Id.* at 775. Plaintiff alleged that Goodyear failed to operate the business in good faith by willfully causing the business to deteriorate, thus depriving plaintiff of part of its consideration. The District Court granted Goodyear's motion for summary judgment, reasoning that a party cannot breach the duty of good faith and fair dealing by conduct expressly permitted by the contract. *Id.* at 778.

This view was rejected in *Tymshare*. The court acknowledged that when a contract is drawn to leave decisions absolutely to the uncontrolled discretion of one of the parties the issue of good faith is irrelevant. *Tymshare, Inc. v. Covell*, 727 F.2d at 1153. The Court noted, however, that "to say that every expressly conferred contractual power is of this nature is virtually to read the doctrine of good faith . . . out of existence." *Id.* at 1153-54.

In contrast to the facts in *VIR*, the Service Agreement limits NGPL's discretion. Section 2 states that "[v]ariations in daily takes may be made at Buyer's election at H-1 delivery points *to meet its varying load conditions*." This requirement limits NGPL's right to refuse deliveries of H-1 gas. NGPL may not refuse deliveries for any reason; it can do so only "to meet its varying load conditions." If NGPL's discretion was unbounded, its promise to take or pay would be illusory.

Any rights NGPL possessed had to be exercised in good faith to effectuate the parties' intent. *Boone v. Kerr-McGee Oil Indus., Inc.*, 217 F.2d 63, 65 (10th Cir.1954). The question is whether substantial evidence supports a finding that NGPL failed to exercise its contractual rights in good faith.

Wyoming's Supreme Court, discussing the U.C.C. standard of good faith, said that good faith consists of "an

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of the Service Agreement. Its actions clearly affected both parties' performance.

honest intention to abstain from taking any unconscientious advantage of another, even through the forms of technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." *Wendling v. Cundall*, 568 P.2d 888, 890 (Wyo.1977) (quoting *Cone v. Irinson*, 4 Wyo. 203, 33 P. 31 (1893)). The test requires honesty of intent rather than diligence or nonnegligence. *Id.*

From the evidence presented at trial, the jury could have reasonably concluded that NGPL failed this test. For example, NGPL renominated its full capacity under the Service Agreement, yet refused to accept delivery of those volumes when the renomination became effective. NGPL also singled out CIG for minimal or zero takes and failed to follow its own gas scheduling policies. CIG adduced evidence from which the jury could have concluded that NGPL lied to CIG about the shut-in. *See supra* text at 1467-68; *see also* Tr. at 2274. This alone would show that NGPL failed to act with the "honesty of intent" required by § 1-201.

NGPL argues however, that CIG failed to prove the reasonable commercial standards of fair dealing within the natural gas industry. CIG's expert, Mr. Morgan, pointed out that reasonable standards in the industry originate in the need for long-term stability due to the high cost of pipeline construction. Mr. Morgan testified that reasonable commercial standards are incapable of precise definition and instad must be determined from the facts of each case. Tr. at 2197-98. The courts support this approach. *See Tymshare, Inc. v. Covell*, 727 F.2d at 1152 (quoting Sumers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va.L.Rev. 195, 201 (1968) (good faith is a concept without general meaning)). Instead of providing a formula, Mr. Morgan gave specific examples of conduct which would not comport with reasonable standards within the industry. This evidence sufficiently defined industry standards of fair dealing.

An opposite conclusion does not assist NGPL. The U.C.C. requires observance of reasonable commercial standards of fair dealing *and* honesty in fact in the transaction. U.C.C. § 2-103(1)(b). Both requirements must be satisfied to meet the duty of good faith. Here, evidence showed that NGPL did not act honestly in fact in its transactions with CIG. The jury could reasonably find a breach of the duty of good faith and fair dealing on NGPL's part. *See Neumiller Farms, Inc. v. Cornett*, 368 So.2d 272 (Ala.1979) (a party rejecting another's performance for feigned reasons does not exercise discretion within the parties' contemplation). The verdict thus cannot be set aside.

E. Conclusion

Despite its forceful arguments, NGPL failed to meet the demanding standards required to upset a jury verdict. The jury found in favor of CIG after considering sharply conflicting testimony from which reasonable minds could draw different conclusions. In these circumstances, the Court must defer to the jury. A highly distinguished practitioner articulated the reason for the courts' deference to jury verdicts:

> It is possible to take the record of any trial and by minute dissection and post-facto reasoning demonstrate that witnesses for either side made egregious errors or lied. Then by ascribing critical weight to the exposed facts, the conclusion is reached that the verdict was fraudulently obtained.
>
> . . . .
>
> The fallacy in this approach is that it assumes that all the evidence for the winning side must be believed by the jury, or it would not decide as it did. It ignores the jury's right to be selective of a witness' story and also the reality of conflict of testimony, which the jury must resolve by applying its common sense and keen observation of the witnesses. . . .

> The jury may choose to believe one witness, and often does, against five witnesses who testified to the contrary.
>
> . . . .
>
> Nor does it follow that because there is alloy in some pieces of gold on one side of the scales that the jury's recognition of its meretricious nature requires it to ignore the decisive tipping of the scales from other weights on the same scale. The opposite scale might be lighter, too. . . .
>
> The point is that it is the composite effects which is determinative, not a dissection of each fact as if it were the whole.

L. Nizer, *The Implosion Conspiracy* 6-7 (1973).

The standards for judgment notwithstanding the verdict require the Court to uphold the jury's action if it finds rational support in the evidence. *See supra* text at 1457-58. Substantial conflicting evidence supports the jury's verdict in favor of CIG. NGPL's motion for judgment notwithstanding the verdict must therefore be denied.

## II. DAMAGES

NGPL attacks CIG's proof of damages. At a minimum, NGPL contends, a remittitur must be granted as to $117,000,000 awarded to CIG as future damages, $53,000,000 in Northwest Pipeline Company minimum bill payments, and $24,000,000 in restitutionary damages for tortious interference with contract. NGPL urges in the alternative that judgment notwithstanding the verdict or new trial is required because:

(1) Future fixed costs cannot be recovered as damages for breach of the Service Agreement;

(2) Minimum bill payments CIG owes to Northwest Pipeline Company are nonrecoverable consequential damages;

(3) CIG's poof of damages was impermissibly speculative;

(4) The jury ignored offsetting benefits accruing to CIG as a result of NGPL's actions;

(5) The jury awarded improper damages for tortious interference with contract; and

(6) CIG failed to prove antitrust damages.

Each contention will be examined in turn.

The jury found that CIG suffered $159,797,156 in damages as a result of NGPL's breach of contract. This is the sum of CIG's lost profits ($106,580,792) plus minimum bill payments CIG owes to Northwest Pipeline Company ($53,216,364). The Court deleted the award from the judgment because recovery of contract damages would have duplicated recovery under the antitrust claim. NGPL nevertheless challenges the award on two grounds. Its first argument is that future fixed costs due under the Service Agreement cannot be recovered as damages for breach of contract. NGPL also argues that CIG's minimum bill payments are nonrecoverable consequential damages. Both elements of damage, however, are recoverable under the provisions of the Uniform Commercial Code.

NGPL argues that future damages cannot be recovered when a contract is still being performed. The Service Agreement continues in force until FERC permits the parties to abandon it. NGPL therefore concludes that, absent a total breach of contract, CIG may not recover future damages based on fixed cost payments not yet due under the Service Agreement.

When a buyer wrongfully rejects goods or repudiates with respect to a part or the whole, the seller may recover damages for nonacceptance. U.C.C. § 2-703. The measure of damages for the buyer's nonacceptance or repudiation is the difference between the market price at the time and place of tender and the unpaid contract

price, plus any incidental damages, but less expenses saved in consequence of the buyer's breach. *Id* § 2-708(1). Lost profits are available as an alternative measure of damages if the market-contract price differential in 2-708 (1) is inadequate to put the seller in as good a position as if the buyer had fully performed. *Id.* § 2-708(1).

A market must exist in order to recover market based damages under § 2-708(1). Absent a market for the goods, § 2-708(1) is an inadequate measure of damages. *Autonumerics, Inc. v. Bayer Indus., Inc.*, 144 Ariz. 181, 696 P.2d 1330, 1340 (Ariz.App.1984). *Accord Copymate Marketing Ltd. v. Modern Merchandising, Inc.*, 34 Wash. App. 300, 660 P.2d 332 (1983); *Nuemiller Farms, Inc. v. Cornett*, 368 So.2d 272 (Ala.1979); *Timber Access Indus. Co. v. U.S. Plywood-Champion Papers, Inc.*, 263 Or. 509, 503 P.2d 482 (1972); *Anchorage Centennial Dev. Co. v. Van Wormer & Rodrigues, Inc.*, 443 P.2d 596 (Alaska 1968). In this case, the shut-in effectively prevented CIG from transporting natural gas. No market existed for CIG's gas so long as NGPL refused to take. The market-contract price measure of damages in § 2-708(1) does not adequately measure CIG's damages. CIG can be made whole only by receiving its lost profits under the Service Agreement and consequently is entitled to recover future fixed costs pursuant to § 2-708(2).

Similarly, CIG's minimum bill payments to Northwest Pipeline Company are recoverable as reasonable overhead under § 2-708(2) or as incidental damages under § 2-710. In order to supply NGPL with the values required under the Service Agreement, CIG purchased natural gas from Northwest Pipeline Company. CIG has incurred substantial minimum bill payments to Northwest Pipeline Company for the gas CIG is unable to take because of the shut-in. The minimum bill payments were awarded to CIG as damages for breach of the Service Agreement. NGPL urges that these payments are nonrecoverable consequential damages.

Consequential damages are generally nonrecoverable. U.C.C. § 1-106(1). Sellers may, however, recover incidental damages. A seller's incidental damges include "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." *Id.* § 2-710. The goal is to put the seller in the same position as if the buyer had performed. *Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.*, 697 F.2d 481, 483 (2d Cir.1983). CIG's minimum bill payments can be viewed as commercially reasonable charges incurred in stopping delivery as a result of NGPL's breach. These expenses are recoverable under § 2-710, and the jury properly awarded them as damages to CIG.

B. CIG's Proof of Damages and Offsetting Benefits Received by CIG

NGPL contends that the testimony of CIG's damage expert, Dr. Rhodes, was based on erroneous assumptions. Especially in antitrust litigation the burden of proving the amount of damages is less than that required to prove the fact of damage. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1526 (10th Cir. 1984), *aff'd*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). If the calculations upon which damages, including lost profits, are reasonably estimated and if the record supports the expert's assumptions, the calculations are a valid measurement of damage. *Id.* (quoting *King & King Enter. v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir.1981)).

NGPL's objections go to the weight and credibility of Dr. Rhodes' testimony. Dr. Rhodes explained his assumptions and their inadequacies to the jury. Counsel for NGPL cross-examined Dr. Rhodes at length in an attempt to discredit his testimony. Dr. Rhodes grounded his calcu-

lations on CIG's accounting records and tariff filings. Tr. at 2845-46; 2848-51; 2853-54. The calculations were reasonably estimated and were supported by the record. The weight to be accorded Dr. Rhodes' testimony was consequently a question for the jury. *State Office Systems, Inc. v. Olivetti Corp of America*, 762 F.2d 843, 846 (10th Cir. 1985); *Brown v. McGram-Edison Co.*, 736 F.2d 609, 616 (10th Cir.1984). The jury belived Dr. Rhodes' testimony and rejected NGPL's contention that CIG benefited from the release of Champlin's Whitney Canyon gas. CIG presented evidence that a reasonable possibility existed of renegotiating the price of the Whitney Canyon gas. The jury's verdict was not against the weight of the evidence.

C. Tortious Interference with Contract

NGPL challenges the jury's damage award for tortious interference with contract. That award included damages incurred as a result of demand charges payable to Overthrust and Canyon Compression to ship the Whitney Canyon gas, plus $24,026,517 in restitution for profits received by Trailblazer Pipeline Company for transporting Whitney Canyon gas.

NGPL would limit damages for tortious interference with contract to extra expenses incurred by CIG in performing its contract with Champlin. The measure of damages for tortious interference with contract, however, is "the amount which will compensate for all the detriment proximately caused by the breach of duty." *Martin v. Wing*, 667 P.2d 1159, 1163 (Wyo. 1983). Substantial evidence supports the conclusion that the demand charges payable to Overthrust and Canyon Compression were incurred as a proximate result of NGPL's wrongful interference.

NGPL next claims that restitution is not an appropriate remedy for tortious interference with contract. Damages for tortious interference are based in tort, not in contract. *Restatement (Second) of Torts* § 774A com-

ment d. Restitution has long been an accepted remedy for tortious interference with contract. *See, e.g., Zippertubing Co. v. Teleflex, Inc.*, 757 F.2d 1401 (3rd Cir. 1985); *National Merchandising Corp. v. Leyden*, 370 Mass. 425, 348 N.E.2d 771 (1976); *Automatic Laundry Serv. v. Demas*, 216 Md. 544, 141 A.2d 497 (1958); *Schechter v. Friedman*, 141 N.J.Eq. 318, 57 A.2d 251 (Ct.Err. & App. 1948); *Caskie v. Philadelphia Rapid Transit Co.*, 321 Pa. 157, 184 A. 17 (1936); *Second Nat'l Bank v. M. Samuel & Sons, Inc.*, 12 F.2d 963 (2d Cir.), *cert. denied*, 273 U.S. 720, 47 S.Ct. 110, 71 L.Ed. 857 (1926); *Federal Sugar Refining Co. v. United States Sugar Equalization Bd.*, 268 F. 575 (S.D.N.Y.1920). Restitution is available as a remedy, and CIG was entitled to restitution of profits for NGPL's tortious interference with contract.

Care must be taken, however, "to avoid gouging even the consciously wrong defendant." D. Dobbs, *Law of Remedies* § 6.4 at 465 (1973). Only one-third of the Trailblazer Pipeline Company is owned by NGPL. Forcing it to disgorge funds it did not receive would unfairly penalize NGPL. A remittitur of two-thirds of $24,026,517, the amount awarded as restitution for profits received by Trailblazer Pipeline, is appropriate. The sum owed by NGPL totals $8,008,839. The Court will therefore grant a remittitur in the amount of $16,017,678.

D. Antitrust Damages

Recovery of treble damages requires proof of antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.* The injury must reflect the anticompetitive effect of the violation or of the anticompetitive acts made possible by the violation. It should be the type of loss that the claimed violation would be likely to cause. *Id.* The antitrust vio-

lation in this case is NGPL's attempt to monopolize the market for the long distance transportation of Wyoming natural gas. To satisfy the *Brunswick* standard CIG had to show that its injury and resulting damages were causally related to a) the long distance transportation of b) Wyoming natural gas.

CIG claimed three elements of antitrust damage: demand charge losses incurred by CIG as a result of the shut-in; minimum bill payments CIG owes Northwest Pipeline as a result of the shut-in; and lost profits. Demand charges are contractual payments required to reserve transportation capacity through a pipeline. Tr. at 2623. The Northwest Pipeline bill is a sum CIG must pay to Northwest Pipeline for gas it is unable to ship due to the shut-in. Tr. at 264-35. As explained earlier, the Northwest Pipeline payments and CIG's demand charge losses are causally related to the antitrust violation.

Lost profits are the remaining element of damage which must be considered. CIG's damage expert, Dr. Rhodes, testified that CIG's lost net profits (discounted to present value) totaled $106,580,792. He reached this figure by adding CIG's past lost net profits to CIG's future net lost profits. Tr. at 2564-65; Plaintiff's Ex. 1768. Dr. Rhodes calculated past lost net profits by subtracting F-1 from H-1 lost profits. Tr. at 2561. He subtracted F-1 lost profits from past damages because NGPL had paid those costs in its minimum bill payments. Tr. at 2771. He included future F-1 lost profits in calculating future net lost profits, however, because NGPL had not paid those costs. Dr. Rhodes therefore calculated future net lost profits by adding future H-1 lost net profits to future F-1 lost net profits. Tr. at 2610. CIG's total future net lost profits totaled $60,388,000.

Certain volumes of gas delivered at the H-1 delivery point are transported from Wyoming. Tr. at 229-30. In contrast, F-1 gas is produced from wells in Oklahoma and flows through gathering lines to the F-1 delivery point

in Forgan, Oklahoma. None of the gas sold under F-1 is transported through the main transmission system. Tr. at 229.

Given CIG's antitrust theory, damages based upon F-1 costs are not recoverable as antitrust damages. F-1 gas is not produced in Wyoming and is not shipped in the long distance transportation market for Wyoming gas. *Ipso facto*, damages based upon lost profits for F-1 gas are unrelated to NGPL's attempt to monopolize the long distance transportation of Wyoming natural gas. Consequently, future net lost profits based upon F-1 fixed costs are not the type of injury that the antitrust violation was likely to produce. Losses of future F-1 profits do not flow from that which made NGPL's actions unlawful. *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. The jury erred in awarding these losses as antitrust damages, and NGPL is entitled to a remittitur of damages based upon future F-1 lost profits.

The total amount of future net lost profits was $60,388,000. Dr. Rhodes' testimony and his damage summary (Defendants' Ex. 3036) does not disclose what portion of that amount consists of future H-1 lost profits and what portion consists of future F-1 lost profits. The record's silence prevents the Court from deleting only F-1 lost profits. The Court will therefore grant a remittitur for all future net lost profits after trebling.

As explained above, CIG is entitled to recover future lost profits as contract damages. *See supra* text at 1477-78. The jury awarded CIG $159,797,156 in damages for breach of contract. At CIG's suggestion and with CIG's consent, the Court reduced the judgment by this amount in order to prevent double recovery. Included in the total award for contract damages was $106,580,792 for lost profits. This sum includes the $60,388,000 in future net lost profits. The jury therefore awarded CIG its future net lost profits as contract damages. The Court will not impose additional liability

on NGPL by allowing CIG to recover future net lost profits as damages for breach of contract, because the jury previously awarded these sums as contract damages. Accordingly, the Court will grant a remittitur of $181,164,000 ($60,388,000 trebled) and reinstate the jury's award of contract damages in the amount of $60,388,000.

## III. NEW TRIAL

NGPL contends that it was denied due process in the trial of this case. A new trial may be granted under Fed.R.Civ.P. 59 to ensure that justice is done. *Holmes v. Wack*, 464 F.2d 86, 88-89 (10th Cir.1972). The burden of showing harmful error, however, rests with the moving party. 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2803 at 32 (1973). NGPL's contentions are without merit, and its motion for a new trial will be denied.

The first point of controversy is a poem written by a juror during the trial. The juror gave the poem to the Court's law clerk, who reported the contact to the Court. Contrary to counsel's assertion, neither the Court nor its staff circulated copies to the jury. The Court instead gave typed copies to counsel to inform them of the development. Counsel failed to request any remedial action by the Court but instead waited to object until long after a verdict was returned. NGPL consequently waived its claim of error. *General Motors Corp. v. Walden*, 406 F.2d 606, 610 (10th Cir.1969). Moreover, NGPL exaggerates the significance of the poem. Interpreting the poem as a criticism of NGPL's witnesses is pure speculation. The poem reflects fatigue caused by a lengthy trial requiring the jurors' intense concentration. It does not suggest that the jury was biased or improperly formed an opinion. Indeed, the poem is not cognizable evidence of juror misconduct. Fed.R.Evid. 606(b); *United States v. Jelsma*, 630 F.2d 778, 779 (10th Cir.1980). Substantial evidence supported the jury's decision. This shows that the jury was not inflamed or biased against NGPL.

NGPL argues that the Court incorrectly instructed the jury on the obligations imposed by the Service Agreement. NGPL particularly objects to "the failure to instruct the jury that Natural had no obligation to take CIG's gas." NGPL Brief at 45 n. 26. The jury was expressly instructed, however, that it could not find a breach of the Service Agreement unless NGPL failed to request the minimum volumes specified in the Service Agreement *and* failed to pay the proper fixed costs of volumes not taken under Section 2. Jury Instruction No. 14. This instruction is substantially the same as NGPL's Revised Proposed Instruction No. 30 and makes clear that NGPL was not in breach of contract merely by refusing to take CIG's gas.[4]

At CIG's request, the Court instructed the jury that CIG claimed that NGPL sought to create a monopoly for the Trailblazer System. The pretrial order stated that NGPL attempted to create a monopoly for the Trailblazer Pipeline. NGPL asserts that permitting CIG to change its antitrust theory at the jury instruction conference defeated NGPL's defense.

The instructions were consistent with the evidence adduced at trial. CIG moved to amend the pleadings, pursuant to Fed.R.Civ.P. 15(b), to conform to the evidence. The Court granted the motion without objection from NGPL, and the pretrial order was consequently amended. By failing to object to CIG's evidence and by producing its own evidence on the issue, NGPL impliedly consented to trial of the amended issues. *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456-57 (10th Cir.1982).

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[4] NGPL also claims that Jury Instruction No. 16 confused the jury by incorrectly stating the effect of FERC's orders. This contention is addressed earlier in the opinion. *See supra* text at 1471-73 NGPL also asserts that the Court excluded relevant evidence of FERC proceedings. The Court, however, permitted witnesses to testify concerning any FERC order that formed the basis of their opinion or influenced their actions.

NGPL contends that the Court improperly excluded testimony not fully designated prior to trial. Ample notice was given to NGPL of the necessity to provide specific witness designations. NGPL did not object to the requirement that both parties submit simultaneous witness designations one month prior to trial. NGPL's unsupported assertion that the excluded testimony resulted in prejudice does not meet the required showing. *Andrews v. Olin Mathieson Chem. Corp.*, 334 F.2d 422, 428 (8th Cir.1964).

Evidence that NGPL relied on the advice of counsel was rejected by the Court. NGPL resisted discovery on this issue. A party refusing to permit discovery on the advice of counsel may not assert the defense at trial. *International Tel. & Tel. Corp. v. United Tel. Co. of Florida*, 60 F.R.D. 177, 186 (M.D.Fla.1973). Bias against NGPL offered its brief in support of the proffered evidence moments before the matter was argued. The Court provisionally excluded the evidence and, after studying a NGPL's memorandum, reaffirmed its ruling. NGPL's assertion that CIG was permitted to present evidence of its reliance on the advice of counsel distorts the facts. NGPL raised this issue on cross-examination of a CIG witness. Tr. at 1211-13.

The Court excluded NGPL's evidence that CIG threatened to intervene in FERC proceedings. The *Noerr-Pennington* Doctrine bars such evidence. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Nothing suggests an abuse or corruption of the judicial process justifying admission of the evidence under the "sham exception" to the rule. *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1176-77 & n. 7 (10th Cir.1982).

NGPL contends that permitting the claim of breach of the duty of good faith to go to the jury allowed CIG

to mislead and inflame the jury during closing arguments. A cause of action does exist for breach of the duty. *See supra* text at 1474-76. The claim was properly submitted to the jury. NGPL failed to object to CIG's closing argument at trial. Its present challenge is untimely. *Computer Systems Eng'g., Inc. v. Qantel Corp.*, 740 F.2d 59, 69 (1st Cir.1984).

Carefully comparing the record with NGPL's assertions reveals no prejudice requiring a new trial. The motion for a new trial must be denied. It is therefore

ORDERED that unless plaintiff Colorado Interstate Gas Company or its attorney remits the sum of $197,181,678 on the judgment entered herein with ten (10) days from the date of this order, the verdict of the jury be, and the same hereby is, set aside and a new trial will be ordered.

If plaintiff or its attorney remits the sum of $197,181,678 the judgment entered herein within ten (10) days from the date of this order, the motion for a new trial is denied, and the jury's award for breach of contract, as previously reduced by the Court, is reinstated nunc pro tunc in the amount of $60,388,000. In this event the clerk of the court is directed to correct the judgment heretofore entered in this case to conform to the amount of the verdict as herein reduced and reinstated.

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 90-8046

COLORADO INTERSTATE GAS COMPANY,
*Plaintiff-Counterclaim-Defendant-Appellee,*

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
NGPL-TRAILBLAZER, INC.,
*Defendants-Counterclaimants-Appellants,*

v.

WYOMING INTERSTATE COMPANY, LTD., and
THE COASTAL CORPORATION,
*Counterclaim-Defendants-Appellees,*

MIDCON VENTURES, INC.,
*Counterclaimant.*

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JUDGMENT

Entered June 16, 1992

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Before HOLLOWAY, BARRETT, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, KELLY, Circuit Judges, and BROWN, District Judge.*

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* The Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas Sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellant Procedure, appellee's suggestion for rehearing en banc was transmitted to the panel judges and to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Chief Judge McKay and Circuit Judge Ebel did not participate in consideration or disposition of the suggestion for rehearing en banc. Since argument and decision, Judge Holloway took senior status effective May 31, 1992.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

**APPENDIX F**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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No. C84-0139-8

COLORADO INTERSTATE GAS COMPANY,
*Plaintiff,*

vs.

NATURAL GAS PIPELINE COMPANY OF AMERICA and
NGPL-TRAILBLAZER, INC.,
*Defendants.*

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NATURAL GAS PIPELINE COMPANY OF AMERICA,
MIDCON VENTURES, INC., and
NGPL-TRAILBLAZER, INC.,
*Counterclaim-Plaintiffs,*

vs.

COLORADO INTERSTATE GAS COMPANY,
WYOMING INTERSTATE COMPANY, LTD.,
and THE COASTAL CORPORATION,
*Counterclaim-Defendants.*

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VERDICT FORM AND
SPECIAL INTERROGATORIES

[Filed Oct. 30, 1986]

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We, the jury, duly empaneled and sworn in this case, do find by a preponderance of the evidence, as follows:

## I. CLAIMS OF COLORADO INTERSTATE GAS COMPANY

### A. *Breach of Contract*

1. Did Natural breach the July 27, 1982 Service Agreement between Natural and Colorado Interstate?

✔ Yes —— No

2. Did Natural violate its duty of good faith and fair dealing in its performance of the Service Agreement?

✔ Yes —— No

3. If your answer to both questions is no, proceed to Section B. If your answer to Question 1 or 2 or both of them is yes, state below the amount of actual damages, if any, to which Colorado Interstate is entitled.

| | |
|---|---|
| Lost Profits/Fixed Costs | $106,580,792 |
| Northwest Pipeline Payments | $ 53,216,364 |
| Total | $159,797,156 |

### B. *Tortious Interference With Contractual or Business Relationship*

1. Did Natural intentionally and improperly interfere with a gas supply contract between Colorado Interstate and Champlin Petroleum Company?

✔ Yes —— No

2. If your answer to Question 1 is no, proceed to Section C. If your answer to Question 1 is yes, state below the amount of actual damages, if any, to which Colorado Interstate is entitled.

| | |
|---|---|
| Demand Charges (Canyon Creek and Overthrust) | $15,204,555 |
| Restitution/Benefits Received | $24,026,517 |
| Total | $39,231,072 |

C. *Attempt to Monopolize*

1. Did Colorado Interstate prove the existence of a relevant market in which the alleged attempt to monopolize occurred?

✔ Yes —— No

2. Did Natural specifically intend to create a monopoly in the relevant market?

✔ Yes —— No

3. Was there a dangerous probability of success in monopolizing the relevant market?

✔ Yes —— No

4. Did Natural engage in some act or conduct in furtherance of its alleged attempt to monopolize the relevant market, even if that act or conduct was actually insufficient to produce the intended monopoly?

✔ Yes —— No

5. Did Colorado Interstate suffer injury to its business or property as a direct and proximate result of Natural's conduct?

✔ Yes —— No

6. Do not answer Question 6 if you answered no to any question in Section C. If all of your answers in Section C were yes, state below the amount of actual damages, if any, to which Colorado Interstate is entitled.

| | |
|---|---|
| Lost Profits/Fixed Costs | $106,580,792 |
| Northwest Pipeline Payments | $ 53,216,364 |
| Demand Charges (Canyon Creek and Overthrust) | $ 15,204,555 |
| Total | $175,001,711 |

## II. CLAIMS OF NATURAL GAS PIPELINE COMPANY AND NGPL-TRAILBLAZER AGAINST COLORADO INTERSTATE GAS COMPANY, THE COASTAL CORPORATION, AND WIC

### A. *Monopolization of the Purchase of Natural Gas*

1. Did Natural or NGPL-Trailblazer prove the existence of a relevant market in connection with their claim that Colorado Interstate, WIC, or Coastal monopolized the purchase of natural gas?

✔ Yes —— No

2. Did Colorado Interstate, WIC, or Coastal possess monopoly power over the purchase of natural gas within the relevant market?

—— Yes ✔ No

3. Did Colorado Interstate, WIC, or Coastal willfully acquire, maintain or use monopoly power over the purchase of natural gas within the relevant market?

—— Yes ✔ No –

4. Did Natural or NGPL-Trailblazer suffer injury to their business or property as a direct and proximate result of Colorado Interstate's, WIC's or Coastal's alleged monopoly?

| | | |
|---|---|---|
| Natural | —— Yes | ✔ No |
| NGPL-Trailblazer | —— Yes | ✔ No |

5. If you answer yes to Questions 1, 2, and 3 in Section A and if you find that Natural or NGPL-Trailblazer, or both, were injured by the alleged monopoly, state below the amount of actual damages, if any, to which Natural or NGPL-Trailblazer, or both, are entitled.

**Natural** $_____

**NGPL-Trailblazer** $_____

B. *Monopolization of the Transportation of Natural Gas*

1. Did Natural or NGPL-Trailblazer prove the existence of a relevant market in connection with their claim that Colorado Interstate, WIC or Coastal monopolized the transportation of natural gas?

✔ Yes —— No

2. Did Colorado Interstate, WIC or Coastal possess monopoly power over the transportation of natural gas within the relevant market?

—— Yes ✔ No

3. Did Colorado Interstate, WIC or Coastal willfully acquire, maintain or use monopoly power over the transportation of natural gas within the relevant market?

—— Yes ✔ No

4. Did Natural or NGPL-Trailblazer suffer injury to their business or property as a direct and proximate result of Colorado Interstate's, WIC's or Coastal's alleged monoply?

Natural —— Yes ✔ No

NGPL-Trailblazer —— Yes ✔ No

5. If you answer yes to Questions 1, 2, and 3 in Section B and if you find that Natural or NGPL-Trailblazer, or both, were injured by the alleged monopoly, state below the amount of actual damages, if any, to which Natural or NGPL-Trailblazer, or both, are entitled.

**Natural** $_____

**NGPL-Trailblazer** $_____

C. *Attempt to Monopolize the Purchase of Natural Gas*

1. Did Natural or NGPL-Trailblazer prove the existence of a relevant market in connection with their claim

that Colorado Interstate, WIC or Coastal attempted to monopolize the purchase of natural gas?

✔ Yes —— No

2. Did Colorado Interstate, WIC or Coastal specifically intend to monopolize the purchase of natural gas within the relevant market?

—— Yes ✔ No

3. Was there a dangerous probability that Colorado Interstate, WIC or Coastal would monopolize the purchase of natural gas within the relevant market?

—— Yes ✔ No

4. Did Colorado Interstate, WIC or Coastal engage in some act or conduct in furtherance of their alleged attempt to monopolize the purchase of natural gas within the relevant market, even if that act or conduct was actually insufficient to produce the intended monopoly?

—— Yes ✔ No

5. Did Natural or NGPL-Trailblazer suffer injury to their property or business as a direct and proximate result of Colorado Interstate's, WIC's or Coastal's alleged attempt to monopolize the purchase of natural gas within the relevant market?

| | | |
|---|---|---|
| Natural | —— Yes | ✔ No |
| NGPL-Trailblazer | —— Yes | ✔ No |

6. If you answer yes to Questions 1, 2, 3, and 4 in Section C and if you find that Natural or NGPL-Trailblazer, or both, were injured by the alleged attempt to monopolize, state below the amount of actual damages, if any, to which Natural or NGPL-Trailblazer, or both, are entitled.

| | |
|---|---|
| **Natural** | $———— |
| **NGPL-Trailblazer** | $———— |

D. *Attempt to Monopolize the Transportation of Natural Gas*

1. Did Natural or NGPL-Trailblazer prove the existence of a relevant market in connection with their claim that Colorado Interstate, WIC or Coastal attempted to monopolize the transportation of natural gas?

✔ Yes —— No

2. Did Colorado Interstate, WIC or Coastal specifically intend to monopolize the transportation of natural gas within the relevant market?

—— Yes ✔ No

3. Was there a dangerous probability that Colorado Interstate, WIC or Coastal would monopolize the transportation of natural gas within the relevant market?

—— Yes ✔ No

4. Did Colorado Interstate, WIC or Coastal engage in some act or conduct in furtherance of their alleged attempt to monopolize the transportation of natural gas within the relevant market, even if that act was actually insufficient to produce the intended monopoly?

—— Yes ✔ No

5. Did Natural or NGPL-Trailblazer suffer injury to their property or business as a direct and proximate result of Colorado Interstate's, WIC's or Coastal's alleged attempt to monopolize the transportation of natural gas within the relevant market?

Natural —— Yes ✔ No

NGPL-Trailblazer —— Yes ✔ No

6. If you answer yes to Questions 1, 2, 3, and 4 in Section D and if you find that Natural or NGPL-Trailblazer, or both, were injured by the alleged attempt to monopolize, state below the amount of actual damages,

if any, to which Natural or NGPL-Trailblazer, or both, are entitled.

**Natural** $_____

**NGPL-Trailblazer** $_____

Dated this 30th day of October, 1986

/s/ [illegible]
Foreperson